FILED
SEP 23 19
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS,
THE CITY OF FORT WORTH, TEXAS,
AND THE DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD,

Petitioners,

v.

SOUTHWEST AIRLINES CO., and
TEXAS AERONAUTICS COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

N. ALEX BICKLEY, City Attorney
City of Dallas, Texas
501 City Hall
Dallas, Texas 75201

S. G. JOHNDROE, JR., City Attorney
City of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

LEE E. HOLT, Legal Counsel
Dallas-Fort Worth Regional
Airport Board
P.O. Drawer DFW
Dallas-Fort Worth Airport
Texas 75261

ERWIN N. GRISWOLD
JAMES M. BURGER
Reavis, Pogue, Neal and Rose
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 737-0125

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	14
I. THE COURT OF APPEALS, BY INTERPRETING A STATE AGENCY ORDER SO AS TO VOID PART OF THE NATIONAL AIRPORT SYSTEM PLAN, HAS IGNORED FEDERAL PRE-EMPTION OF THE FIELD OF AIR SAFETY, AIRPORT CONTROL AND NATIONAL AIR COMMERCE	15
A. Pre-emption of airspace and airport control has developed as an integral part of federal control of air commerce and air safety, culminating in an established federal policy.	16
B. The Congressional pre-emption of the field in airport planning has been implemented in this case by federal administrative action.	24
1. The overriding factors of air safety and efficient utilization of airspace required pre-emption by federal administrative action.	25
2. The Dallas-Fort Worth Airport development was pursuant to, and in accord with, the National Airport Plan.	31

Page

C. Since pre-emption is a matter of substance and not of form, the federal government has occupied the field, and therefore, conflicting state orders are a nullity. 37

D. The decision of the Court of Appeals is in direct conflict with this Court's decision in *Burbank v. Lockheed Air Terminal.* 41

E. The Order of the TAC, as construed by the Court below, creates an undue and unlawful burden on interstate commerce. 42

F. Determination of the reasonableness of airport use classifications is within the primary administrative jurisdiction of FAA, a fact ignored by the Court below. 43

II. THE DECISION BELOW IS IN DIRECT CONFLICT WITH A RECENT DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. 48

III. THE COURT OF APPEALS EXCEEDED THE PROPER SCOPE OF JUDICIAL REVIEW IN UNNECESSARILY DECIDING QUESTIONS OF STATE LAW. 50

IV. AN ORDER OF A STATE AGENCY CONFERRING THE RIGHT TO "PERPETUAL" AIRPORT USE WITHOUT NOTICE, HEARING, RECORD, EVIDENCE OR PARTIES IS VOID; HOWEVER, THE COURT BELOW UPHELD SUCH ORDER. 54

CONCLUSION 58

TABLE OF AUTHORITIES

Cases:

Aircraft Owners and Pilots Ass'n v. Port Authority of New York, 305 F. Supp. 93 (E.D.N.Y. 1969) 45

Airport Commission of Forsyth County v. C.A.B., 300 F.2d 185 (4th Cir. 1962) 26

Burbank v. Lockheed Air Terminal, 411 U.S. 624 . . . . . *passim*

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 24

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 37

Hines v. Davidowitz, 312 U.S. 52 37

Interstate Commerce Commission v. Louisville & N.R.R., 227 U.S. 88 55

Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 40

Lockheed Air Terminal v. City of Burbank, 318 F. Supp. 914 (C.D. Cal. 1970) 43

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 37

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 50

Southern Ry. v. Virginia ex rel. Shirley, 290 U.S. 190 56

Page

United States v. City of New Haven, 496 F.2d 452 (2d Cir. 1974), appeal filed sub nom. Town of East Haven v. United States, 43 U.S.L.W. 3124 (U.S. July 30, 1974, No. 74-37) 48, 49

United States v. Lee, 106 U.S. 196 57

United States v. Western Pacific R.R., 352 U.S. 59 44

Statutes and Ordinances:

Air Commerce Act of 1926, ch. 344, 44 Stat. 568 17

Airport and Airway Development Act of 1970, 49 U.S.C. §1701 *et seq.* (1970) . . . . . *passim*

Cities of Dallas and Fort Worth, 1968 Regional Airport Concurrent Bond Ordinance . . . . . *passim*

Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 . . . 17, 18

Federal Airport Act, ch. 251, 60 Stat. 170 (1946) . . . . . *passim*

Federal Aviation Act of 1958, 49 U.S.C. §1301 *et seq.* (1970) . . . . . *passim*

Noise Control Act of 1972, 42 U.S.C. §4901 *et seq.* 973) 15, 16

National Environmental Policy Act of 1969, 42 U.S.C. §4331 *et seq.* (1973) 33

Texas Aeronautics Commission Act, Vernon's Ann. Civ. St. Art. 46c-1 *et seq.* (1974 Supp.) . . . . . *passim*

Texas Municipal Airports Act, Vernon's Ann. Civ. St. Art 46d-1 *et seq.* (1969) . . . . . *passim*

28 U.S.C. §1254(1) (1970) 2

28 U.S.C. §1331 (1970) 6

28 U S.C. §1337 (1970) 6

United States Constitution, Amend. XIV. 56

Page

Miscellaneous:

Civil Aeronautics Authority, Airport Survey, Report to the Congress of the United States (1939) 17, 18, 19

Civil Aeronautics Board, Dallas-Fort Worth Regional Airport Investigation,
Order E-18719 (August 10, 1962) 27, 28
Order E-21341 (September 30, 1964) 28

Civil Aeronautics Board and Federal Aviation Agency, Joint Statement (April 24, 1961) 25

14 C.F.R. §§ 151 and 152 (1974) 34, 40

Dallas-Fort Worth Regional Airport Board, Over-All Preliminary Plan for Construction of the Dallas-Fort Worth Regional Airport (Sept. 1968) 31

Department of Transportation, Federal Aviation Administration, Airport Design Standards - General Aviation Airports - Basic and General Transport, FAA Advisory Circular 150/5300-6 (July 14, 1969) 33

Department of Transportation, Federal Aviation Administration, 1966/1967 National Airport Plan FY1968-1972 30

Department of Transportation, Federal Aviation Administration, 1972 National Airport System Plan 32, 35, 38

Federal Aviation Agency, National Airport Plan FY 1965-1969 29

Federal Aviation Agency, 1965 National Airport Plan FY 1966-1970 ..... 28, 29

Hearings on H.R. 9738 Before the House Comm. on Interstate and Foreign Commerce, 75th Cong., 3d Sess. (1938) 18

Hearings on H.R. 12711 Before the Subcomm. of the Senate Comm. on Appropriations, Independent Offices Appropriation 1962, 87th Cong. 2d Sess. 27

Page

House Report No. 2360, 85th Cong., 2d Sess. (1958) 21

Legislative History of the Federal Airport Act. Pub. L. No. 377, 79th Cong., 2d Sess. 19, 20

2 U.S. Code Cong. & Ad. News 3741-3742 (1958) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. _____

THE CITY OF DALLAS, TEXAS,
THE CITY OF FORT WORTH, TEXAS,
AND THE DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD,

Petitioners,

v.

SOUTHWEST AIRLINES CO., and
TEXAS AERONAUTICS COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, the City of Dallas, Texas (Dallas), the City of Fort Worth, Texas (Fort Worth), and the Dallas-Fort Worth Regional Airport Board (Airport Board), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United

States Court of Appeals for the Fifth Circuit entered in this proceeding on May 31, 1974. This case involves an overriding question of federal pre-emption of airspace and air facilities which only this Court can resolve. In addition, the decision in this case is in conflict with a recent decision of the Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, 494 F.2d 773, *rehearing denied*, 496 F.2d 1407 (1974), appears in Appendix A. The opinion of the United States District Court for the Northern District of Texas, 371 F. Supp. 1015 (1973), appears in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 31, 1974. A timely petition for rehearing *en banc* was denied on June 24, 1974. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1970).

QUESTIONS PRESENTED

1. Whether federal law which grants the Federal Aviation Administration exclusive jurisdiction over the safe and efficient conduct of air commerce has pre-empted the field of airport control and thus prevents implementation of an order of a state aeronautical authority in a manner which, as interpreted below, nullifies part of the National Airport System Plan, promulgated and implemented pursuant to federal law.

2. Whether a determination of the reasonableness of airport use classifications adopted by proprietors of a federally funded airport, in cooperation with the FAA in implementation of the National Airport System Plan, is a matter within the primary administrative jurisdiction of the FAA under the Airport and Airway Development Act.

3. Whether an order of a state aeronautical authority burdens interstate commerce and causes Dallas to violate its federal agreements, where such order (1) is construed as directing municipal airport authorities to permit a scheduled intrastate carrier to operate in perpetuity from an airport being closed to all scheduled air carriers by its municipal proprietor under decisions of the FAA pursuant to the National Airport System Plan, and (2) results in an exclusive use of that airport by scheduled intrastate carriers and an unjust discrimination against scheduled interstate carriers.

4. Whether the court below exceeded the proper scope of judicial review when it construed matters of state law unnecessary to resolution of the federal questions upon which jurisdiction was based, where such determinations affect the scope of authority over airports as between proprietor home-rule municipalities and a state aeronautical agency.

5. Whether the Court of Appeals incorrectly decided the state law by relying on an erroneous interpretation of an order of a state agency adopted without notice or hearing, contrary to requirements of due process and the applicable state statute.

STATUTORY PROVISIONS INVOLVED

1. The Federal Aviation Act of 1958, 49 U.S.C. §1301 *et seq.* (1970).

2. The Airport and Airway Development Act of 1970, 49 U.S.C. §1701 *et seq.* (1970), formerly the Federal Airport Act, ch. 251, 60 Stat. 170 (1946).

3. Texas Aeronautics Commission Act, Vernon's Texas Ann. Civ. St. Art. 46c-1 *et seq.* (1974 Supp.)

4. Texas Municipal Airports Act, Vernon's Ann. Civ. St. Art. 46d-1 *et seq.* (1969).

Relevant sections of the statutes are set out in the Appendix.

STATEMENT OF THE CASE

This case involves the control and use of the world's largest airport, the Dallas-Fort Worth Regional Airport

(Regional Airport). This airport was constructed and financed, at a cost of over one billion dollars, by the cities of Dallas and Fort Worth, in compliance with the requirements of the federal government, pursuant to the National Airport System Plan. Federal law grants the Federal Aviation Administration (FAA) exclusive jurisdiction over the safe and efficient conduct of air commerce, and requires the FAA to establish and insure the implementation of the National Airport System Plan (Plan). The effect is a pervasive and complete federal scheme for airspace safety and management, and for the planning, funding and regulation of public airports.

Pursuant to the Plan, the cities, in cooperation with the FAA and the Civil Aeronautics Board (CAB), assigned specific functions to each airport integrated into the Dallas-Fort Worth complex of airports. The Plan and the regional airport project have been frustrated by an order of the Texas Aeronautics Commission (TAC), which, as construed below, directs a scheduled intrastate carrier to provide services in perpetuity from an area airport being closed to scheduled carriers pursuant to the Plan. This state action has prevented the planned and agreed move of all scheduled carriers to the Regional Airport as required by the Plan. The court below, failing to recognize federal pre-emption and failing to defer to the primary jurisdiction of the FAA, upheld the order. At issue in this case is the right of the federal government

and the municipal proprietors of airports developed in the Dallas-Fort Worth megalopolis pursuant to the National Airport System Plan jointly to regulate the use of those airports.

In this case, local enforcement of the Plan necessitated the filing of Petitioners' complaint against Southwest Airlines Co. (Southwest), seeking a declaration that the phase-out provision of their 1968 Regional Airport Concurrent Bond Ordinance (Bond Ordinance) was valid to preclude Southwest from continuing to provide scheduled air service at Dallas Love Field, contrary to the Plan. Jurisdiction in the District Court was founded on the existence of a federal question and amount in controversy, 28 U.S.C. §1331 (1970), and on an act of Congress regulating commerce, 28 U.S.C. §1337 (1970).

Under the Plan, Regional Airport was to be constructed and designated as the single airport to serve the scheduled air carrier needs of the two cities and the region. Under the Plan, also, the airports previously in existence (Love Field, Redbird Airport, and Meacham Field) were to be used for taxi, charter, private and other non-scheduled forms of air transportation.[1] The decisions of the courts below nullify this part of the FAA National Airport System Plan.

---

[1] Fort Worth's Greater Southwest International Airport (GSIA) has been closed pursuant to the Plan because, *inter alia*, of safety considerations involving an overlap of airspace requirements with the Regional Airport.

In the early 1960's, the FAA and CAB both determined that Dallas and Fort Worth should receive scheduled airline service at a single airport. Limitations of the existing facilities at Love Field and Greater Southwest International Airport (GSIA), as well as regional rivalries, made construction of a single new scheduled airline airport mandatory. At that time, the FAA considered that the problem would be resolved by action of the CAB, as further detailed herein.

Planning for the Regional Airport was fully coordinated by Dallas and Fort Worth[2] with both the regional and Washington offices of the FAA in accordance with the National Airport Plans prepared annually by the FAA during 1963-1968. (R. 3906-3907)* In 1966, before actual construction of the new Regional Airport was commenced, the FAA conducted a "Simulation Study" of the total proposed air transportation system for the area, at a cost of approximately one quarter million dollars, to determine whether the proposal constituted the most efficient use of airspace in the region. (R. 555). From that study, the FAA determined that the

[2]The plan initially was to create a separate governmental entity. However, after a Texas constitutional amendment and enactment of an enabling statute, a further prerequisite election in Dallas County defeated the proposal. On April 15, 1968, Dallas and Fort Worth executed a new contract providing for construction of the Regional Airport as a joint venture and for establishment of the Dallas-Fort Worth Regional Airport Board, an administrative arm of the two cities, to plan and operate the airport.

*References to the Record below, as set out in the Appendix filed in the Court of Appeals, are denoted herein as "R."

operation of the proposed Regional Airport for scheduled air carrier service, and the operation of the other airports in the system for only non-scheduled forms of air transportation, were consistent with maximum air safety and were required to meet projected needs for the geographical region. (R. 555, 556). Construction[3] of the Regional Airport and its designation as the single airport to serve the scheduled air carrier needs of the two cities constitute an integral part of the National Airport System Plan, developed by the FAA.[4]

Thirteen federal grants in aid aggregating in excess of $60 million have been approved for the Regional Airport under so-called "sponsor agreements" between the FAA and the cities. Total costs thus far are over one billion dollars. In accordance with agreements between the cities and eight scheduled interstate airlines[5] serving Dallas and Fort Worth, the latter are to

---

[3]Upon approval by the FAA of the plan for development of the Regional Airport, the first federal grant in aid was made, effective June 27, 1966. Actual construction commenced in 1968. Aircraft operations commenced January 13, 1974.

[4]The National Airport Plan, provided for in the Federal Airport Act, ch. 251, §3, 60 Stat. 170 (1946), is designated the National Airport System Plan in the Airport and Airways Development Act of 1970. For purposes here, the concepts under each statute are substantially the same, and the term "Plan" under each statute is used interchangeably.

[5]These carriers—American, Braniff, Texas International, Delta, Continental, Eastern, Frontier and Ozark—conduct a substantial portion of all United States air commerce.

absorb the costs represented by the revenue bonds in the event that other airport revenues are insufficient.

The federal aid of over $60 million afforded by the FAA for the Regional Airport was predicated upon a series of assurances that all scheduled airline activity would be conducted at the Regional Airport. (R. 897). Moreover, continuing federal aid for the pre-existing airport facilities in the Dallas-Fort Worth system also was predicated upon this commitment because a total system plan for the entire area was involved. (R. 560). Further, as a condition precedent to the approval of the airport development project by the FAA, assurances were executed by the cities that "the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination."[6]

The agreements with the interstate carriers, the sponsor agreements with the FAA, and the revenue and general bond ordinances were entered into prior to March, 1970. Each implemented the comprehensive air transportation system plan for the Dallas-Fort Worth area. Each was a necessary step in providing that the Regional Airport would be the single airport to serve the scheduled air carrier needs for Dallas and Fort Worth. All of these steps were approved by the FAA.

---

[6]As required by 49 U.S.C. §1718 (1) (1970), formerly 49 U.S.C. §1110. Such assurances have been made by the Cities of Dallas and Fort Worth for the Regional Airport as well as for each of the pre-existing airports.

They constituted an integral part of federal control over aviation and facilities used therefor and of the air service and Airport Plans for the nation as well.

On June 18, 1971, five years after the federal Plan had been adopted and implementation commenced, Southwest began serving Dallas/Fort Worth, Houston, and San Antonio on a scheduled basis in competition with five interstate carriers. Southwest operates under Certificate of Public Convenience and Necessity No. 22, issued by the Texas Aeronautics Commission. This certificate authorizes Southwest to begin and terminate service at any airport serving those points *but does not direct the use of any particular airport*. In 1971 Southwest served Dallas/Fort Worth through Love Field, where it obtained a sublease of the facilities of Delta Air Lines, not the airport proprietor. (R.3789). On November 12, 1971, the TAC, without notice to any parties and without public hearing, passed its Minute Order No. 22 to the effect that no TAC certificated air carrier could change its point of service (airport) without permission of the TAC. (R. 4368). It is the effect of this order which is at issue in this case.

Under Texas law (Vernon's Ann. Civ. St. Art. 46d-7a (1969)), and the federal law (49 U.S.C. §1712(c) (1970)), the municipalities and the federal government are cooperating units in developing a nationwide system of public airports and in designating the specific aeronautical role of each airport within that system. Dallas and Fort Worth have acted in strict accordance

with their power and responsibility under the Texas Municipal Airports Act. In accordance with the applicable federal laws, the cities and Regional Airport Board coordinated their planning with the FAA and CAB. Together, these governmental authorities exercised their state and federal authority and responsibility to construct, maintain and determine the appropriate uses of public airports, owned by the cities and funded in part by the federal government. Recognizing this, the Attorney General of the State of Texas approved the 1968 Bond Ordinance.[7] Said ordinance included the provision that scheduled air carriers, including TAC certified carriers, would be phased out of Love Field. (R. 2231). On this representation by the Attorney General, over $400 million in revenue bonds have been

---

[7]This ordinance, adopted concurrently by Dallas and Fort Worth on November 11, 1968, authorized the issuance of Dallas-Fort Worth Regional Airport Joint Revenue Bonds for the construction of the Regional Airport, and provided, *inter alia*, that:

> "... the Cities, each with respect to its own individually owned airport facilities, ... hereby covenant and agree that from and after the effective date of this Ordinance, shall take such steps as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport." (R. 2147, 2195).

sold, federal funds of $60 million have been allocated in reliance upon the sponsorship agreements by the cities, and a total of one billion dollars, including interest, committed.

Southwest refuses to serve Dallas through the new Regional Airport as required by the comprehensive air transportation system Plan. Southwest claims that, as an intrastate carrier, the TAC has given it a "right" to use Love Field so long as that field is an airport, and that neither the cities nor the federal government may determine otherwise. App. B, p. 2b.

The District Court and the Court of Appeals have upheld this claim of a Southwest right to use Love Field in perpetuity, even though Southwest had no agreement with the owning city[8] for such use. Such use violates the comprehensive air transportation system Plan established by the cities, and approved by the FAA as part of the National Airport System Plan. Such use constitutes an exclusive right in the use of Love Field and discriminates against interstate carriers which are required to use the Regional Airport under the Plan.

---

[8] As Delta has transferred its operations from Love Field to the Regional Airport, its lease at Love Field has been terminated. Southwest is presently operating pursuant to a lease with Dallas, entered into after the District Court ordered that Dallas could not lawfully exclude Southwest " . . . from the use of Love Field, Dallas, Texas, and its airport facilities so long as Love Field remains open as an airport." App. B., p. 38b. The lease is contingent upon a final decision in this case.

It further violates the Airport and Airway Development Act of 1970, (AADA), 49 U.S.C. §1701 *et seq.* (1970), and its predecessor the Federal Airport Act, ch. 251, 60 Stat. 170 (1946) and the Federal Aviation Act of 1958, 49 U.S.C. §1301 *et seq.* (1970) and will thwart the federal policy to insure a coordinated adequate national system of airports and airways. It constitutes an unlawful extension of the Texas statute, under which the TAC purports to function.

The disastrous effect of the courts' decisions is already apparent. Other scheduled air carriers now claim that they may not be excluded from Love Field if Southwest is allowed to remain. As the Court of Appeals itself noted, Braniff refused to close its services from Love, and Texas International has reopened there.[9] In addition, American and Delta have sought to enjoin Dallas and Fort Worth from breaching their commitments, and American has refused to pay certain landing fee obligations at the Regional Airport.[10] Not

---

[9]App. A, p. 2a n.1. Braniff served Love Field from the opening of Regional Airport on January 13, 1974, until September 1, 1974. When Braniff discontinued service, Southwest significantly increased its service at Love Field. Texas International also is providing service at Love. The Cities have no assurance that Braniff will not attempt to re-institute service at Love Field in the future or that other CAB carriers will not do so as Southwest secures new intrastate routes competitive to those of CAB carriers.

[10]Delta and American sued to enjoin Fort Worth, Dallas and Braniff for breach of agreement relative to the transfer of all "certificated air carrier" services to the Regional Airport. Fort Worth will counterclaim against American and cross-claim against Braniff. [N.D. Texas, C.A. 3-74-401-C (formerly C.A. 4-74-84), filed March 26, 1974]. This suit has been consolidated in the Dallas Division of the District Court with *Southwest Airlines et al. v. The City of Dallas* (C.A. 3-74-344-C, N.D. Texas, filed April 16, 1974).

only does this have an adverse economic impact upon the Regional Airport and its interstate air carrier users, it also thwarts the comprehensive airport system Plan which the FAA and CAB determined to be consistent with the attainment of economic air transportation service, efficient airspace utilization, and maximum air safety. (R. 584-585).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of the interrelation of federal and state law in a way which ignores the established law as to pre-emption, and frustrates an important federal policy which has overriding national significance. It also ignores, and is in conflict with, the approach taken by this Court in *Burbank v. Lockheed Air Terminal*, 411 U.S. 624.

Further, the decision below is in direct conflict with a recent decision of the Court of Appeals for the Second Circuit which held that the field of regulation of navigable airspace and airport operations had been entirely pre-empted by federal law.

I.

THE COURT OF APPEALS, BY INTERPRETING A STATE AGENCY ORDER SO AS TO VOID PART OF THE NATIONAL AIRPORT SYSTEM PLAN, HAS IGNORED FEDERAL PRE-EMPTION OF THE FIELD OF AIR SAFETY, AIRPORT CONTROL AND NATIONAL AIR COMMERCE.

Burbank v. Lockheed Air Terminal, 411 U.S. 624, leaves no doubt that no state or local agency may be allowed to exercise power which would in any way conflict with or impede the FAA's exclusive jurisdiction to efficiently and safely manage the navigable airspace.

In *Burbank* the airspace management power was supplemented by the additional powers given the FAA under the Noise Control Act of 1972, but the Court obviously concluded that even in the absence of the Noise Control Act, state and local authorities could not be allowed to regulate any activity which would infringe on the FAA's airspace management function. *Id.* at 640.

In the instant case the very same airspace management power of the FAA is infringed upon by the authority found by the Court of Appeals to be vested in the TAC. This is necessarily so inasmuch as that court concluded that the TAC had directed Southwest to serve Love Field and that the Ordinance excluding all scheduled air carrier flights was ineffective, *even*

though this exclusion was an integral part of the Plan developed by the FAA for the efficient and safe utilization of the airspace in the Dallas-Fort Worth area and even though the FAA insisted on such exclusion as a condition to its approval of the new Regional Airport.

But as in *Burbank*, the airspace control power is not the only basis for finding pre-emption. There, the Noise Control Act formed an additional and substantial basis for the finding. The Federal Airport Act and the AADA form substantial additional bases for a finding of pre-emption here.

A. Pre-emption of airspace and airport control has developed as an integral part of federal control of air commerce and air safety, culminating in an established federal policy.

The basis for federal pre-emption in this field can be understood through a review of the history and development of airports as a part of federal control of air commerce. By slow but steady steps, a federal policy with respect to airports has developed. The field of airport policy, which was once largely local, has clearly been fully occupied by the federal government. The determination to take over complete control of airport policy, particularly at a great complex like the Dallas-Fort Worth Regional Airport, is now so clear that it should be beyond frustration by state action.

In aeronautical history, airports were at first local ventures, often municipally owned and financed. Municipalities provided airports as a municipal utility without benefit of financial assistance from the federal government. The Air Commerce Act of 1926, ch. 344, 44 Stat. 568, was enacted to encourage and regulate the use of aircraft in commerce and for other purposes. The first evidence of federal concern about airports is found in Section 2 of that Act which required the Secretary of Commerce to foster air commerce, *inter alia*, by encouraging the establishment of airports. Section 5(b) also authorized the Secretary to designate and establish civil airways and, within the limits of available funds, to establish, operate and maintain along such airways all necessary air navigation facilities except airports.

It was soon recognized, however, that the airport is basic to all aeronautical activity. Civil Aeronautics Authority, *Airport Survey, Report to the Congress of the United States* 1-2 (1939). Legislative developments over the past thirty-six years show clearly the pervasive character of the development of federal control of airspace and airports, and in this process the role of municipalities in sponsoring airports has become one of cooperating with the federal government.

The first substantial step towards over-all federal interest in aviation is found in the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (now Federal Aviation Act of 1958), which created the Civil Aeronautics Authority (CAA) as a separate agency. Its purpose was, *inter alia*, to encourage and foster the development of civil

aeronautics and air commerce in the United States and abroad, and to encourage the establishment of civil airways, landing areas, and other air navigation facilities. At that time, there were some 200 airports on the established airways, which had been procured, made available and maintained mostly "by the expenditure of political subdivisions of the States, counties, cities and the like." *Hearings on H.R. 9738 Before the House Comm. on Interstate and Foreign Commerce*, 75th Cong., 3d Sess. 110 (1938).

A key provision of the 1938 Act, §302(c), directed the Administrator of the CAA to make a field survey of the existing system of airports. He then was required to present to the Congress, not later than February 1, 1939, definite recommendations (1) as to whether the federal government should participate in the construction, improvement, development, operation or maintenance of a national system of airports, and (2) if federal participation was recommended, the extent to which, and the manner in which, the federal government should participate. The CAA, in accordance with this direction, submitted its *Airport Survey, Report to the Congress of the United States, supra*.

The survey disclosed, *inter alia*, that, while municipal airports had received cooperation from the Army and Post Office air mail service, the first financial support was given through the Civil Works Administration in 1933, followed by the Federal Emergency Relief Administration in April 1934, and the Works Progress

Administration in 1935 (*Airport Survey, supra*, 10-12, 15). The CAA submitted sixteen recommendations which were based on the principle that the development and maintenance of an adequate system of airports should be recognized as a matter of national concern and a proper object of federal expenditures.

The march of events inevitably led to greater federal interest in and concern about airports. In 1945, as World War II was coming to a close, the subject of federal aid for public airports again received the attention of Congress. At that time the Secretary of Commerce stated:

> "Mr. Chairman, the legislation before this committee recognizes that civil aviation has become of national importance. It represents the first step in our 40 years of aviation history toward the establishment of a long-range Federal-aid program for the construction of airports. Its importance cannot be overemphasized, for it will govern the development of the American airport system for many years to come."[11]

The hearings finally led to the Federal Airport Act of 1946, which evidenced federal concern and movement into the field. This was the first comprehensive provision of federal aid for the development of public airports. Under the law, the Administrator of Civil Aeronautics[12] was directed to prepare and revise annually "a national plan for the development of public

---

[11]2 Legislative History of the Federal Airport Act, Pub. L. No. 377, 79th Cong., 2d Sess. 13.

[12]This title was changed to Administrator of the Federal Aviation Administration by Sec. 301 of the Federal Aviation Act of 1958, 49 U.S.C. §1341 (1970).

airports." ch. 251, §3(a), 60 Stat. 170 (1946). In order to bring about a nationwide system of public airports adequate to meet the needs of civil aeronautics, the Administrator was authorized to make grants of funds to sponsors for airport development. Ch. 251, §4, 60 Stat. 170 (1946). Municipalities were authorized to sponsor airport projects and enter into grant agreements directly with the federal government, following the principle that "it is the community that pays and it is fair that its wishes be of primary importance."[13] But the responsibility for the overall National Airport Plan remained with the federal government.[14] Where federal aid is to be expanded, the pervasive character of the federal control is clear. Moreover, the law provided specific conditions for project sponsorship and grant agreements relative to airport uses and provided that grant agreements constitute an obligation of the United States and of the sponsors. Ch. 251, §§ 11, 12, 60 Stat. 170 (1946).

This statute was amended a number of times. One of the most important amendments was the Federal Aviation Act of 1958, 49 U.S.C. §1301 *et seq.* (1970). This statute continued the Civil Aeronautics Board and, by Section 301, established the Federal Aviation Agency, headed by an Administrator who is "responsible for the exercise of all powers" of the Agency.

---

[13] 2 Legislative History, *supra*, at 779. (Congressman Randolph).

[14] 1 Legislative History, *supra*, at 53.

In its Declaration of Policy in this Act, Congress provided as follows:

> "Sec. 103. In the exercise and performance of his powers and duties under this Act the Administrator shall consider the following, among other things, as being in the public interest:
>
> * * * * *
>
> "(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both."

By Section 307 of the Act, Congress provided:

> "(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace."

The intention of Congress to occupy the whole field of airport control is further illustrated by the Committee Reports.[15]

---

[15] *See* H.R. Rep. No. 2360, 85th Cong., 2d Sess. (1958), where the House Comm. on Interstate and Foreign Commerce said that "the Administrator of the new Federal Aviation Agency . . . would be charged with the *management of the national airspace*, including responsibility for establishing and enforcing air traffic rules. . . ." The report further provided that the head of "the new Federal Aviation Agency" would have "plenary authority to—

(a) *Allocate airspace and control its use* by both civil and military aircraft;

(continued)

Under these statutes, the Administrator complied with his duty to make airport plans and these were duly reported to Congress. Congress appropriated large sums of money for airport development, and the Administrator made many grants in accordance with the Act. Finally, in 1970, the Federal Airport Act of 1946 was repealed and was superseded by the Airport and Airway Development Act of 1970 (AADA), 49 U.S.C. §1701 *et. seq.*, which is the governing law today. In that overall air regulatory legislation, Congress specifically found that "the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation." 49 U.S.C. §1701 (1970). Congress also formally declared:

> "That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense." 49 U.S.C. §1701 (1970).

To insure a coordinated adequate national system of airports and airways, Congress directed the Secretary of

---

(b) Make and enforce air traffic rules for both civil and military aircraft:. . . ." (Emphasis added.) 2 U.S. Code Cong. & Ad. News 3741-3742 (1958).

Thus, Congress plainly showed its intention to give the Administrator authority over "the national airspace" and "plenary authority" to "allocate airspace and control its use." There could hardly be a clearer indication of the intention of Congress to occupy the field.

Transportation to prepare, and to review and revise as necessary,

> "a national airport system plan for the development of public airports in the United States. . . . In preparing the plan, the Secretary shall consider the needs of all segments of civil aviation." 49 U.S.C. §1712(a) (1970).

This clearly shows the pre-emptive nature of the airport Plan. It is to be a "*national*" plan. And it is to be made for "all segments of civil aviation." This includes general and intrastate aviation, as well as interstate aviation.

To further the development of airports and airways in the national system, Congress authorized an initial obligation of $2.5 billion. Under the legislative scheme, public agencies (states or subdivisions thereof), as "sponsors," obtain development funds by submitting a "project application" to the Administrator of the FAA (as delegate for the Secretary of Transportation). The statute expressly provides that only applications proposing "airport development . . . included in the then current revision of the national airport system plan" are accepted for review. In addition, the project must conform to all standards prescribed by the Secretary, *e.g.*, site location, layout, safety of approaches, etc. 49 U.S.C. §1716(a) (1970).

The sponsor's project application must be approved by the Secretary. Before approval is granted, the project must be scrutinized under the Act's standards, and may be approved only if

> "the project is reasonably consistent with plans (existing at the time of approval of the project) of

> planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purpose of this subchapter;" 49 U.S.C. §1716(c)(1)(A) (1970).

Further,

> "As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that–
>
> (1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination;" 49 U.S.C. §1718(1) (1970).

Finally, if the project application is acceptable under the standards set forth and is approved, an offer to make a grant is extended to the applicant. Acceptance of the grant creates "an obligation of the United States and of the sponsor." 49 U.S.C. §1719 (1970). This constitutes a federal authorization to the city or other sponsor regardless of any limitation or qualification on its powers under state law. See *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320.

B. The Congressional pre-emption of the field in airport planning has been implemented in this case by federal administrative action.

Not only was there clear statutory authorization to develop plans for airports, both in the 1946 and the

1970 Acts, but this authorization was effectively carried out by the relevant administrative agencies. One of the questions which arose early was the policy to be followed where there were two or more airports in close proximity to each other. This was a matter of concern both to the CAB because of its economic regulation of interstate carriers, and to the FAA, with respect to all carriers, and all air navigation, because of the FAA's specific responsibility to formulate the National Airport Plan, and also because of the FAA's responsibilities with respect to air safety. It should be remembered that the FAA is a single member agency, formerly in the Department of Commerce, and now in the Department of Transportation (DOT). The Administrator of the FAA speaks for the agency, pursuant to his statutory and delegated powers, often without "orders" or "minutes" which are found in dealing with multimember agencies.

1. The overriding factors of air safety and efficient utilization of airspace required pre-emption by federal administrative action.

In order to deal with the problem of multiple airports in the same general area, and prompted by increased congestion and the introduction of jet aircraft, the Chairman of the CAB (Alan S. Boyd) and the Administrator of the FAA (N.E. Halaby) issued a Joint Statement on April 24, 1961. In this Statement, they declared:

> "The Federal Aviation Agency and the Civil Aeronautics Board have become increasingly con-

> cerned over the establishment of separate air carrier airports in cities sufficiently close to be served through one airport. . . . The concentration of the services provided to an area through the use of one airport will often improve the service offered by both scheduled airlines and general aviation. . . .
>
> * * *
>
> "The Federal Aviation Agency and the Civil Aeronautics Board agree that the use of a single airport serving adjacent communities, where such action may result in a saving both to the Federal Government and the locality served, as well as improving the air service to the area, should be an increasingly important factor in considering applications for federal funds for airport construction purposes and applications for certificated airline service."

See Airport Commission of Forsyth County v. CAB, 300 F.2d 185, 187 (4th Cir. 1962).[16]

---

[16]The Court of Appeals for the Fourth Circuit, in affirming a CAB decision to consolidate service to Greensboro, Winston-Salem and High Point, North Carolina, had occasion to comment on the Joint Policy Statement. The Court found it to be not a prejudgment by the CAB in a specific case, but "a statement that the Board intends to discharge its statutory obligations by serving the public interest." *Airport Commission of Forsyth County v. CAB*, 300 F.2d 185, 187 (4th Cir. 1962). The Court took particular notice that the pronouncement was jointly issued by the CAB and the FAA. The Court held that the statement was not a formal rulemaking on the part of the CAB, "[r]ather it was an announcement in furtherance of the policy making function of the Federal Aviation Agency in which it was expedient that the Board express its concurrence." *Id.* at 188. "Its principal thrust was directed toward the use of federal money in the construction of new airports." *Id.*

At this time there were serious rivalries between Dallas and Fort Worth over whether Love Field of GSIA would be chosen as the single airport. During this period Dallas Love Field grant requests were delayed. Contemporaneously, the FAA expended over $7.4 million at Fort Worth's GSIA in anticipation that the cities would resolve their differences and designate GSIA as the regional airport.[17]

Both the FAA and the CAB continued to urge Dallas and Fort Worth to agree on a regional airport for all airline services. Federal action, moreover, became formal and coercive. The FAA halted all funding of Love Field projects. In testimony before the subcommittee of the Senate Appropriations Committee, Administrator Halaby stated his policy regarding funding pending the establishment of a regional airport: "We have refused to put another nickel of grant-in-aid funds in [Love Field] because there is a darn good jet airport halfway between Dallas and Fort Worth."[18] At this time, the CAB instituted the *Dallas-Fort Worth Regional Airport Investigation*, Order E-18719, August 10, 1962, designed to lead to a single airport in the Dallas-Fort Worth area.

---

[17]Until the end of the 1950's GSIA's status in the National Airport Plan was unlimited, whereas Love Field was restricted.

[18]*Hearings on H.R. 12711 before the Subcomm. of the Senate Comm. on Appropriations, Independent Offices Appropriation 1962*, 87th Cong., 2d Sess. at 524. Mr. Halaby was referring to GSIA which was halfway between Dallas and Fort Worth.

The CAB *Dallas-Fort Worth Regional Airport Investigation* culminated in a CAB ultimatum supported by the FAA: The cities were to agree on a regional airport for all airline services, or the CAB would amend all air carrier certificates to name one airport.[19] Order E-21341, September 30, 1964. In this Order, the Board said:

"While we have not yet completed our deliberations in this case, the Board is now of the

[19]The decision below disregarded the integral role of the CAB's contribution to FAA development of the national airport system, and encouragement and development of "air commerce" (*see* 49 U.S.C. §1301(4)). The narrative of the 1965 Plan manifests the CAB/FAA interplay.

> "The Federal Aviation Agency is charged with the development of a national system of public airports to anticipate and meet the needs of civil aeronautics. The National Airport Plan which represents that system includes all airports used by the certificated air carriers, showing development recommended to meet their future needs. Inasmuch as future airline oriented requirements at these airports are based on the expectation of continued airline service, the FAA must look to the Board for information regarding its actions which might affect the future status of these locations." Federal Aviation Agency, *1965 National Airport Plan FY 1966-1970* at 17.

Merely because there are major airline markets within the borders of Texas, the FAA's statutory authority is not vitiated. A large jet operated by Southwest Airlines generates exactly the same image on a radar screen as a Texas International jet. Southwest aircraft offer all the same air traffic control problems as those of any other scheduled airline. While the CAB may have limited authority with respect to intrastate air carriers, there is no such limitation on the FAA's responsibility for airport plans.

> unanimous opinion that service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present and future requirements for transcontinental cargo and passenger service."

The Board said that it

> "believes it is in the public interest to afford the interested communities a final opportunity to arrive at a voluntary solution as to the location of the airport . . . Should the parties, contrary to our expectation, be unable to agree to designation of the airport to serve the area, the Board will then proceed promptly to issue a decision."[20]

The FAA participated in the proceedings before the Board. Its policy goal – a single airport – would have been fulfilled either by an agreement between the cities, or by an order of the Board. In 1964, the only operators of scheduled passenger jet aircraft were CAB approved carriers and, therefore, would *a fortiori* be required to use only the designated airport. While the FAA pursued its goals of a single air carrier airport for the region before the CAB, the FAA officially suspended all airport development projects at both Love Field and GSIA. The 1964 National Airport Plan altered both Love Field and GSIA's future roles. Pending resolution of the regional airport issue, no improvements for either airport were incorporated into the 1964 Plan. Federal Aviation Agency, *National Airport Plan FY 1965-1969* at 206-207. This decision was continued in the 1965 National Airport Plan.

[20]The full text of the Order is printed in Appendix C to this petition.

Faced with a cut-off of federal airport funds and the FAA-prompted CAB order, the cities signed a Memorandum of Understanding on May 28, 1965 (R. 1986), and an Interim Agreement on September 27, 1965. (R.1992). These compacts provided for the initiation of plans and a program for implementation of a joint regional airport project. These agreements were the direct outgrowth of the policy determinations of the FAA and the CAB. They were accepted by and approved by those agencies.

The following year the FAA adopted the 1966/1967 National Airport Plan. This Plan contained the fruits of FAA regional airport policy. For the first time, the Plan included construction of the Dallas-Fort Worth Regional Airport, "TO ULTIMATELY ACCOMMODATE ALL AIRLINE SERVICE." Department of Transportation, Federal Aviation Administration *1966/1967 National Airport Plan FY 1968-1972*, at 186. With formal inclusion of the Dallas–Fort Worth Regional Airport in the Plan, and the cities' agreement to construct a regional airport conforming to the Plan, the FAA tendered grant offers to the Regional Airport Board to begin construction. These grants were reflected in the 1968 Plan which amended the 1966/1967 Plan to include specific federally funded projects for the Regional Airport.

2. The Dallas-Fort Worth Airport development was pursuant to, and in accord with, the National Airport Plan.

Dallas and Fort Worth proceeded to comply with the National Airport Plan and the CAB orders. The Dallas-Fort Worth Regional Airport Board (created by the Contract between the cities, R. 2000) submitted the *Over-All Preliminary Plan for Construction of the Dallas-Fort Worth Regional Airport, September, 1968,* to the respective City Councils. (R. 2017). In conformance with the National Airport Plan, the Airport Board's proposal provided for the transfer of all scheduled airlines to the new Regional Airport.[21] After approval of the Airport Board's plan, Dallas and Fort Worth acted to implement that program. To realize this goal, the cities enacted the *1968 Regional Airport Concurrent Bond Ordinance.* That ordinance required the transfer of all scheduled airlines to the Dallas-Fort Worth Regional Airport, thus satisfying the requirements of the National Airport Plan.[22]

---

[21]"LOVE FIELD AND GSIA COMMERCIAL USES

"It is imperative to the economic feasibility of the financing and construction, and to the practicality, of the Regional Airport that the commercial air carriers presently, and which from time to time during construction will be, using Love Field and GSIA transfer their activities to the Regional Airport when it becomes operational." *Over-All Preliminary Plan,* at IV-1 (R. 2135).

[22]*See* note 7, *supra.*

During construction of the Regional Airport the FAA continued to discharge its responsibilities under its Congressional mandate. With the formal concurrence of the cities in the airport's role, the FAA informally, but nonetheless effectively, continued to participate in the planning and implementation of the Regional Airport project. Rather than set forth in detail that involvement, the following examples adequately demonstrate the depth of that participation: site selection, runway placement, land use planning, an extensive computer simulation study to ensure safe and efficient air traffic control of the Regional Airport, based on all scheduled airline operations at the Regional Airport, with general aviation and military operations at Love and other area fields, etc. All of these FAA efforts were designed to insure that the Regional Airport, and air traffic in the North Texas area, would harmonize with the National Airport Plan.

Twice in recent years the FAA has formally reaffirmed its policy to locate all scheduled airline operations at the Regional Airport. The first was the adoption of the 1972 National Airport System Plan. That Plan integrated Dallas-Fort Worth Regional Airport into the National Airport System and altered Love Field's status.[23] Recognizing that the Regional Airport

[23]Department of Transportation, Federal Aviation Administration, *1972 National Airport System Plan*, Volume ASW, Southwest Region at 36. Passengers per aircraft were forecast to drop from nearly 13 to less than 1.4, reflecting Love's exclusive role as a general aviation field.

was not yet completed, the Plan retained Love Field's status as an airline field. Within five years, however, airline operations were to cease and Love was to become solely a basic transport field, limited to general aviation operations, including business jets up to 60,000 pounds.[24] The Regional Airport, on the other hand, is designated as a primary, scheduled airline airport.

The most recent manifestation of DOT/FAA policy is contained in the Agency's Final Environmental Impact Statement. After review of the Statement, the Secretary of Transportation held it to be consistent with both the National Environmental Policy Act of 1969 (42 U.S.C. §4331 *et seq.*) and the Airport and Airway Development Act of 1970. That Statement provided, in part: "Regional air operations planning anticipates the relocation of all scheduled air carrier operations to the Dallas-Fort Worth Regional Airport once it has opened." Final Environmental Impact Statement, Appendix B, §1.04.1 (May 1972).

The foregoing outlines the gradual formulation and implementation of FAA policy to locate all scheduled airline operations at the Dallas-Fort Worth Regional Airport. First, there was informal action by the Administrator. After that course failed, formal action

---

[24] *See* Department of Transportation, Federal Aviation Administration, *Airport Design Standards–General Aviation Airports–Basic and General Transport*, FAA Advisory Circular 150/5300-6 (July 14, 1969). The gross weight of a Boeing 737, as operated by Southwest, is approximately 111,000 pounds.

by the FAA/CAB was effected through a joint policy statement and CAB proceedings. After the success of those efforts, informal FAA cooperation with the state and local bodies in the planning stages was carried out to insure that the new airport and the old airports would integrate into the National Airport System. Finally, there occurred formal amendment of the National Airport Plan, and inclusion of the Regional Airport, for scheduled airline operations, and Love Field, for the exclusive use of general aviation, in the National Airport System Plan.

Regulations for both the Federal Airport Act and the AADA of 1970 authorize the Administrator of the FAA to implement these programs. 14 C.F.R. §§151 and 152 (1974), respectively. The regulations require applicants to adhere to the statutory standards and delegate responsibility to the Administrator to insure that proposed projects meet those standards. Once approved and accepted, grant agreements may only be amended with the approval of the Administrator, provided such amendments comply with the standards set forth for initial approval.

Federal system planning and use of grants-in-aid are intended to assure the development of airports in accordance with the National Airport System Plan. This is demonstrated in the 1972 Plan, formulated and published to meet the requirements of §12(a) of the AADA (49 U.S.C. §1712(a)):

> "If the national air transportation system is to operate safely and efficiently, the major system

elements, the airways system, and the airports system must be properly related to each other.

* * *

"The national interest in civil airports is cornerstoned upon public safety. Also, as the guardian of the Nation's airspace, the Federal Government has a positive interest in the siting of airports in a manner which enhances efficient as well as safe utilization of the airspace.

* * *

"THE NEED FOR PLANNING. While airport planning is a cooperative effort among the various levels of government and the users of the system, *it is clear that only the Federal Government is in the overview position necessary to provide the guidance to shape airports collectively as a national system.* By virtue of the Airport and Airway Development Act of 1970, a national planning process has been developed calling for participation by every affected element of government, aviation industry, and user community. The *process calls for airport system planning from the bottom up*—guided by long-range Federal definition of the role and system essentially applicable to each existing and future airport within the national system." *1972 National Airport System Plan*, Volume AAS, Narrative and National Summaries at 1-2. (Emphasis added).

Thus, the National Airport System Plan provides a planning tool whereby airports, cooperatively developed by the federal government and local sponsors, assume their proper role in the national system. The federal

government's mandate to assure safe and efficient movement of traffic from airport to airport on a non-disciminatory basis is thereby fulfilled. Grants under the federal airport assistance programs are an essential device by which the FAA insures that airports developed in cooperation with local agencies will conform to the national plan.

In pursuit of this policy, each grant agreement contract contains in substance the following covenant inserted under the authority of 49 U.S.C. §1348 and 49 U.S.C. §1719, or their antecedent statutes:

> "2. The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds, and classes of aeronautical use without discrimination between such types, kinds, and classes: *Provided,* That the Sponsor may establish such fair, equal, and nondiscriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport: *And Provided Further,* That *the Sponsor may prohibit any given type, kind, or class of aeronautical use of the Airport if such action will best serve the aeronautical needs of the area served by the airport.*" (R. 4867). (Emphasis added).

C. Since pre-emption is a matter of substance and not of form, the federal government has occupied the field, and therefore, conflicting state orders are a nullity.

Federal pre-emption does not depend upon any specific formula. The question in each case is whether the federal government has occupied the field. *See Hines v. Davidowitz*, 312 U.S. 52, 67. Thus, to determine if there has been pre-emption, the Court must analyze the character of the regulated subject to resolve

> "whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142.

Federal superintendence of air commerce has been deemed to be pervasive. As Justice Jackson has stated:

> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303. (Jackson, J., concurring).

Regulation of airports is no less significant than that of the airways:

> "The airport is a key element of our national transportation system. The planning and development of airports is of particular importance since it is at the airport that the aviation system must be integrated with other elements of the transportation system, with the communities it serves, and with their environment." Department of Transportation, Federal Aviation Administration, *1972 National Airport System Plan*, Volume AAS, at 1.

Although in the instant case Texas' police power is not challenged, pre-emption does foreclose assertion by Texas of its economic regulatory power as far as airport use is concerned. Dallas, exercising its rights as municipal proprietor of Love Field, adopted reasonable restrictions on the use of its airport, in full cooperation with the federal authorities. Here, the issue is the power of the TAC, in its economic regulation of intrastate carriers, to interfere with this orderly transfer of service from Love Field to the Regional Airport.[25] Clearly, such

[25]The TAC has neither the staff nor the facilities to devise independently a plan of such scope, and must not be permitted to revise it by means of an "order" issued without study nor even any discussion. Created in 1945 with three members, the TAC now has six Commissioners who are paid $10 per diem while attending to their duties, with a yearly maximum of $600. Vernon's Ann. Civ. St. Art. 46c-3 (1974 Supp.). No aeronautical expertise of any kind is necessary. A requirement of five years experience in aeronautical activities was omitted from the 1969 revision of the statute. *Id.*

state action should not be effective against federal authority. Though the AADA contemplates and encourages state and local cooperation in developing the Plan, the Plan is a federal plan, and permitting a state agency to obstruct implementation of the Plan precludes the achievement of the goal of the Act—a coordinated national system of airports.[26] Permitting the decisions below to stand would allow state governments to exercise unilateral, *ex post facto* control over this facet of federal superintendence over safe and efficient air commerce.

In 1966, Dallas and Fort Worth, as subdivisions of the State of Texas, and as potential grantees of federal funds under comprehensive federal legislation relating to airports, had authority to develop the proposed Regional Airport, and to adopt reasonable restrictions on the use of Love Field.[27] Once incorporated into the

---

[26]The extent of the obstruction presented by the TAC order and its effect on the Regional Airport Plan are now becoming apparent. Although the District Court was not impressed by the present petitioners' fears of the economic impact on the Regional Airport if *all* airline traffic followed Southwest and operated out of Love Field, App. B, pp. 16-17b, it is clear that the petitioners were correct and the District Court was wrong. As the Court of Appeals itself noted, "Despite its contract, Braniff has refused to close operations from Love, and Texas International has now reopened there under the umbrella of a state-court injunction." App. A, p. 2a.

[27]In 1968 the Attorney General of the State of Texas approved the 1968 Regional Airport Bond Ordinance containing the requirement that all airline service be moved from Love Field to the Regional Airport. Southwest's original TAC Certificate, authorizing service to the Dallas-Fort Worth area, did not become

(continued)

National Airport System Plan, approved by the FAA, and accepted by the cities, changes could only be accomplished with the consent of the FAA. *See* 14 C.F.R. §§151.31 and 152.135 (1974). The grant agreements are obligations both of the airport sponsor and of the United States, 49 U.S.C. §1719 (1970). Any attempt by a state agency unilaterally to change the status of Love Field, itself federally-funded, should be invalid. *See Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295. The pervasive power inherent in the federal government's regulation of air commerce, evidenced particularly in the development of airports in the National Airport System Plan, pre-empts the state from any such unilateral action.

The TAC order stands as an obstacle to the accomplishment of the full purposes and objectives of Congress contained in the mandate to the Secretary of Transportation to develop a comprehensive national air transportation system which will operate safely and efficiently. The principles of pre-emption require that the instant order be declared invalid. This presents an important question of federal law, not only with respect to this great airport project, but also because of its impact on other projects in many parts of the nation.

---

final until the summer of 1970. TAC Minute Order No. 22, supposedly prohibiting exclusion of Southwest from Love Field, was issued on November 12, 1971. Neither the Certificate nor the Order specifically directs Southwest to serve Dallas/Fort Worth through Love Field.

D. The decision of the Court of Appeals is in direct conflict with this Court's decision in *Burbank v. Lockheed Air Terminal.*

In particular, the decision below is wholly inconsistent with the recent decision of this Court in *Burbank v. Lockheed Air Terminal*, 411 U.S. 624. Though that case involved noise regulation, it was concerned with airport use, and the approach taken by the Court there would lead to a reversal here.

In *Burbank*, as here, there was no direct declaration by Congress of federal pre-emption. But as here, there was a growing development of federal enactments and administrative actions in the area. As the Court said in the *Burbank* case (*Id.* at 638): ". . . each case turns on the peculiarities and special features of the federal regulatory scheme in question." But the Court found pre-emption in "the pervasive control vested in EPA and in FAA" which left "no room for local curfews or other local controls." *Id.* The breadth of federal control over, and concern with, airports and airport use should lead to the same conclusion here, for here, as in *Burbank*, "It is the pervasive nature of the scheme of federal regulations . . . that leads us to conclude that there is pre-emption." *Id.* at 633. The statutory provisions and administrative actions listed above, relating to airports, airport planning, and airport construction, are surely per-

vasive. Here, as in *Burbank*, the actions taken are required to reflect:

> "a delicate balance between safety and efficiency, 49 U.S.C. §1348(a), and the protection of persons on the ground. 49 U.S.C. §1348(c). Any regulations adopted by the Administrator . . .must be consistent with the highest degree of safety. The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." *Id.* at 638-639.

Although this passage was written with respect to noise control at airports, it is equally applicable to the question of classification and usage of airports involved here. Thus, the decision below thwarts the position taken by this Court in *Burbank* which recognizes that such questions of airport use have by long and steady direction of legislative and administrative action been pre-empted by federal authority and are no longer validly subject to state or local control.

E. The Order of the TAC, as construed by the Court below, creates an undue and unlawful burden on interstate commerce.

Although neither the United States Supreme Court nor the Court of Appeals reached the issue, the District

Court in *Burbank* found the ordinance invalid on the basis of conflict with the Commerce Clause, as well as pre-emption. *Lockheed Air Terminal v. City of Burbank*, 318 F. Supp. 914, 921, 926 (C.D. Cal. 1970). As in *Burbank*, the record in this case reveals that the burden on interstate commerce is also great. TAC Minute Order 22 creates an undue preference for an intrastate carrier by permitting it to utilize an airport that is admittedly more convenient and accessible to certain Dallas passengers, and from which the interstate carriers are barred under the Plan. CAB-certificated airlines cannot effectively compete with Southwest if the latter is permitted to continue operating at Love Field; this is "tantamount to exclusion from the market."(R. 526). In addition, the interstate carriers have agreed to absorb any deficit suffered by the Regional Airport. Estimates of the revenues lost to the Regional Airport by Southwest's continued use of Love Field range from a minimum of $400,000 (R. 498-499) to as much as $3,593,300. (R. 1012). These losses must be indirectly absorbed by the scheduled interstate carriers using the Regional Airport, hence creating a burden on interstate commerce.

F. Determination of the reasonableness of airport use classifications is within the primary administrative jurisdiction of FAA, a fact ignored by the Court below.

The District Court held that allowing Southwest to remain at Love Field constitutes neither an "unjust

discrimination" against the departing interstate carriers within the meaning of the AADA, 49 U.S.C. §1718(1), App. B, pp. 12-13b., nor the creation of an "exclusive right" within the meaning of the Federal Aviation Act of 1958, 49 U.S.C. §1349(a), App. B, pp. 13-14b. Instead, the court held, to require Southwest to transfer its services to Regional Airport would constitute both unjust discrimination against Southwest and the creation of an exclusive right in the use of Love Field. In so ruling, the court failed to recognize the primary role assigned by Congress to the FAA in overseeing the distribution and use of federal funds in furtherance of the comprehensive federal scheme of airport planning and development. Maintenance of a proper relationship between the courts and the agency in matters affecting transportation policy here required the District Court to respect the primary jurisdiction of the FAA over these issues. *United States v. Western Pacific R.R.*, 352 U.S. 59, 63.

The soundness of this reasoning is evidenced in the error of the District Court. The court found that while the intrastate services of Southwest would be excluded from Love Field under the provision of the 1968 Ordinance which applies to intrastate services provided by a carrier pursuant to a TAC certificate, "purely intrastate services" provided by carriers pursuant to CAB certificates would not be excluded. App. B, pp. 23-25b. This was found to be unjust discrimination as between the CAB carriers and Southwest. *Id.* at p. 25b. The court overlooked the fact that under their CAB certificates, CAB carriers can only provide interstate

services.[28] Accordingly, there is no "loophole" in the Ordinance which would allow CAB carriers to conduct purely intrastate services at Love Field. There is no such discrimination between the CAB carriers and Southwest.

The District Court erred further in concluding that a "general preference for commercial aviation" over general aviation precludes the exclusion of scheduled commercial air carriers from Love Field. (App. B, p. 29b). The testimony of Henry L. Newman, Regional Administrator of the FAA, makes it clear that Love Field was to become a predominantly general aviation airport. (R. 564-566, 584-585, 949). The FAA is specifically directed to "consider the needs of all segments of civil aviation," 49 U.S.C. §1712(a), and is specifically authorized to make grants for the development of general aviation airports. 49 U.S.C. §1714(a)(2). As the court itself pointed out (App. B, p. 27b), there is here no severe shortage of airport capacity which might require a preference for commercial flights in order to maximize public benefits, as in *Aircraft Owners and Pilots Assn. v. Port Authority of New York*, 305 F. Supp. 93, 108 (E.D.N.Y. 1969). The

[28]CAB carriers can provide services solely within a given state only as part of an interstate route network pursuant to CAB certificate. Such services are also covered by the phase-out provision of the 1968 Ordinance. App. B., pp. 21-22b.

effect of the District Court's holding is to deny the FAA its lawful authority reasonably to segregate general from commercial aviation, even where it determines safety, efficiency and sound airport planning will be maximized thereby.

It is to the Department of Transportation that Congress has assigned the task of formulating and implementing a National Airport System Plan. AADA, 49 U.S.C. §1701 *et seq.* It is the FAA, as delegate of the Department of Transportation, which shall receive assurances that "the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination," 49 U.S.C. §1718(1), and which is to insure that the grant agreement contains "such terms and conditions as the Secretary considers necessary to meet the requirements of this subchapter." 49 U.S.C. §1719 (1970). Determination of the reasonableness of airport use restrictions is clearly a matter within the expertise of the FAA, requiring consideration of numerous factors including here the successful implementation of the Regional Airport Plan which had been prompted and supported by federal aeronautic authorities.

Henry L. Newman, Regional Director of the FAA, testifying in response to questions put by the District Court itself, clearly stated that the FAA "has the responsibility for making that determination of discrimination" (R. 578), and that in deciding to "go ahead with a commitment to participate in this [Regional Airport] investment . . . in effect, the FAA has made a determination" that the phase-out of scheduled airlines from Love Field was not unjustly discriminatory. (R. 942). Yet he emphasized that "if we were faced with a claim of discrimination on this then we would . . . investigate it thoroughly and have whatever hearings were necessary and make the determination" in light of current circumstances. The District Court failed to give any weight to this *de facto* determination by the FAA that the restrictions placed upon the use of Love Field were reasonable, deeming it "immaterial" whether Dallas' actions were consistent with the terms of the AADA, then the Federal Airport Act, noting that the Act did not confer upon the FAA "any economic regulatory power over air carriers." App. B, pp. 14-15 b.

Thus, the Court ignored completely the responsibility and concomitant authority of the FAA to oversee the uses to which federally-funded airports are put, in ensuring that the role played by each such airport is consistent with maximum safety and efficiency within the National Airport System Plan. The Court also denied the FAA an opportunity to expertly reconsider its earlier support of the Love Field phase-out, were it

actually faced with a claim of discrimination at Love Field.

The District Court erred in resolving the issue of the reasonableness of Dallas' airport use classifications, which is initially a matter for FAA determination. The Court of Appeals not only failed to recognize this error, but was itself clearly in error in holding that such use classifications were the province of the TAC, a state agency.

II.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH A RECENT DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The decision below is in direct conflict with an opinion recently issued by the United States Court of Appeals for the Second Circuit, in *United States v. City of New Haven*, 496 F. 2d 452, *appeal filed sub nom. Town of East Haven v. United States*, 43 U.S.L.W. 3124 (U.S. July 30, 1974, No. 74-37). Action by this Court is required to resolve the present confusion over the important question of federal pre-emption of airport operations.

City of New Haven concerns the attempt by state authorities to enjoin airport operations on a runway extended pursuant to the AADA and funded in part by a federal grant, for alleged violations of state law. The City

of East Haven, which abuts the extended runway and over which New Haven acquired the required clear zone, obtained a state court injunction prohibiting the use of the extended runway. East Haven had alleged violations of state law by New Haven in the latter's extension of the runway and acquisition of clear zones pursuant to the National Airport System Plan.

The United States brought suit in federal district court seeking an order requiring the runway to be kept open and enjoining East Haven from enforcing the state court injunction. In holding that federal control of airspace management and airport operations under the Federal Aviation Act and the AADA pre-empted the state injunction, the District Court stated:

> "I appreciate the concern of the Connecticut courts that the laws of the state be obeyed, but *the federal government's ability to proceed with airport development* is not contingent upon the peculiarities of local property laws. As the United States has said in its brief, the legality under state law of New Haven's acquisition of the clear zone area is entirely separate from the question of the power of the state court to enjoin *airport operations whose regulation Congress has entirely pre-empted.*" 367 F. Supp. 1338, 1341 (D. Conn. 1973). (Emphasis added).

The Second Circuit, finding that federal control of airspace is "extensive," affirmed the decision of the District Court. The Court of Appeals concluded that "East Haven cannot enforce its rights under Connecticut law by obtaining a state court injunction which

infringes on federal regulation of navigable airspace." *Id.* at 454.

The instant case presents identical legal issues. The Court of Appeals for the Fifth Circuit, however, ignored federal pre-emption of airport control and navigable airspace.

This conflict justifies the grant of certiorari to review the judgment below.

III.

THE COURT OF APPEALS EXCEEDED THE PROPER SCOPE OF JUDICIAL REVIEW IN UNNECESSARILY DECIDING QUESTIONS OF STATE LAW.

In this case the Fifth Circuit exceeded the proper scope of judicial review by overlooking and ignoring controlling federal law and reaching out to decide the case on a point of state law. While federal courts clearly have jurisdiction to decide matters of state law properly placed before them, the doctrine of abstention requires that federal courts abstain from *unnecessary* decisions of state law. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496. In this case it was clearly unnecessary to decide the state law point inasmuch as the case was

undoubtedly determinable under controlling federal law, as is shown above.[29]

The Court below held that the 1968 Bond Ordinance is in direct conflict with the determination that public convenience and necessity require Southwest to continue serving Dallas through Love Field, and that Dallas must yield to the TAC on this issue.[30] This is doubly

[29]The District Court, in setting forth the bases for its conclusion, stated "... that each ground is, in and of itself, sufficient to preclude Plaintiffs from denying Southwest access to Love Field." App. B, p. 19b. Yet the District Court, having resolved the federal questions presented, unnecessarily rendered conclusions as to state law which were, in the words of the court "[w]holly apart from the federal grounds set forth above..." App. B, p. 32b. The Court of Appeals disposed of the case solely on an issue of state law, thinking it "unnecessary to discuss" the District Court's resolution of federal questions. In light of the substantial impact this decision is certain to have upon airport planning, uses, and financing throughout the United States, this manner of appellate review hardly comports with the requirement of sound discretion.

[30]The District Court itself pointed out that the CAB has jurisdiction over air carriers, not cities or airports. App. B, p. 10b. The federal powers of the CAB are analogous to the state powers of the TAC. "In effect, the TAC is the CAB of Texas." (Brief of Southwest before the District Court, R. 363). Just as CAB may influence airport usage only indirectly through its jurisdiction over *inter*state carriers, so too does TAC have jurisdiction only over *intra*state air carriers, not over airports which Texas does not own or manage. Vernon's Ann. Civ. St. Art. 46c-1 *et seq.* (1974 Supp.).

erroneous. First, there has been *no* determination by the TAC that the public convenience and necessity require that Dallas be served through Love Field rather than the Regional Airport. Southwest's certificate stated that it was authorized to serve the Dallas/Fort Worth region through *any* airport in the area. There is clearly no conflict, then, between the certificate and the 1968 Bond Ordinance. Southwest has *not* been certificated into Love Field. Minute Order 22 merely expresses the TAC's concern with service discontinuations *generally*.[31] It was promulgated suddenly, casually, and without following any of the procedures which attend the issuance of a certificate of public convenience and necessity—or any administrative order—such as a public hearing. Vernon's Ann. Civ. St. Art. 46c-6 (1974 Supp.).

---

[31] "MINUTE ORDER NO. 22

"WHEREAS, air carriers operating under Certificates of Public Convenience and Necessity issued by the Commission are, in some instances without prior knowledge or consent of the Commission ceasing or transferring their air service:

"NOW THEREFORE, in the public interest and to prevent the discontinuance of air service through particular airports without its prior knowledge and consent, this Commission does hereby adopt the following regulation:

" 'From and after the date hereof, no air carrier operating under a Certificate of Public Convenience and Necessity issued by the Commission shall, without the prior written approval of the Commission, discontinue all air service to any airport through which such carrier presently provides air service.'

Adopted November 12, 1971."

Second, regulatory authority of the TAC extends not to airports, but to air carriers. While it is true that the TAC has sole authority over the routes of intrastate carriers, the court was wrong in assuming that this power over routes includes the power to control the use of airports owned by municipalities. The matter is not one which is left to assumption by the statutes of Texas. The Texas Municipal Airports Act plainly and unambiguously says that municipalities have the power to govern their airports and to determine the uses of airports owned by them:

> "A *municipality*, which has established or acquired or which may hereafter establish or acquire an airport or air navigation facility, *is authorized to adopt*, amend and repeal such *reasonable ordinances*, resolutions, rules, regulations and orders *as it shall deem necessary* for the management, government and *use of such airport* or air navigation under its control, whether *situated within or without the territorial limits of the municipality.*" Vernon's Ann. Civ. St. Art. 46d-7(a) (1969). (Emphasis added).

On the other hand, the statute setting out the powers of the TAC does not authorize the TAC to determine the use of airports owned by municipalities. This is emphasized by the fact that the TAC is given the power to control airports owned or held in trust for the state. Vernon's Ann. Civ. St. Art. 46c-6(1) (1974 Supp.).

With respect to municipally owned airports, TAC is encouraged to participate and cooperate with municipalities and "with the federal authorities in development of a national system of civil aviation." Vernon's

Ann. Civ. St. Art. 46c-2. Moreover, one of the purposes of the TAC is "eliminating costly and unnecessary duplication of functions properly in the province of the federal agencies." *Id.* When this purpose of the TAC is viewed against the federal statutes concerning airport planning, funding and uses and providing for a National Airport System Plan, it is clear that the Texas legislature never intended to give the TAC any authority over the use of airports owned by municipalities and that it never intended that the TAC should intrude in plans made by municipalities and the federal government in accordance with the specific power of municipalities under state law and the federal scheme prescribed under federal law.

IV.

AN ORDER OF A STATE AGENCY CONFERRING THE RIGHT TO "PERPETUAL" AIRPORT USE WITHOUT NOTICE, HEARING, RECORD, EVIDENCE OR PARTIES IS VOID; HOWEVER, THE COURT BELOW UPHELD SUCH ORDER.

In contrast to the thorough, step-by-step build-up of federal pre-emption, and the careful, painstaking development and construction of the Regional Airport, is the sudden and casual order of the TAC. This order, promulgated without notice or hearing, as interpreted

by the court below, effectively nullifies this portion of the pervasive federal Plan.

The entry of an order by a state agency, as was done here, without notice, hearing, parties, record or evidence, cannot be the basis of a decision which nullifies a part of the National Airport System Plan. Such an order is, perforce, a nullity. Here, it is not only void under the doctrine of federal pre-emption, but is void as a violation of due process of law.

That said order gave one airport user the right to use an airport in "perpetuity,"[32] without allowing the airport proprietor, other airlines affected, and federal authorities an opportunity to be heard renders the order void under every concept of due process. Yet, the court below upheld the order.

In *Interstate Commerce Commission v. Louisville & N.R.R.*, 227 U.S. 88, an order of the ICC was held void where made without substantial supporting evidence. The Court there stated:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in

[32]*See* footnote 8, *supra.*

another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." 227 U.S. at 91.

The above language is cited with approval in *Southern Ry. v. Virginia ex rel. Shirley*, 290 U.S. 190. The Court there struck down a state statute as violating due process, stating:

> "But by sanctioning the order . . . [the Reviewing Court] in effect, approved action taken without hearing, without evidence, without opportunity to know the basis therefor. This was to rule that such action was not necessarily 'arbitrary'. There is nothing to indicate what that court would deem arbitrary action or how this could be established in the absence of evidence or hearing. In circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion." 290 U.S. at 198.

Here, the Court of Appeals also approved action taken without notice, hearing, evidence, and without opportunity for any party to be present, and in clear violation of the proper administrative procedures. Such lack of procedure clearly violates the fundamental principles of due process.

Even if the Court's interpretation of the minute order had been correct, it is clear that the order could not have had the effect attributed to it because it did

not meet the requirements of the Texas statute with respect to determination of the public convenience and necessity[33] and the Court of Appeal's decision clearly assumes that Minute Order No. 22 was a determination of the public convenience and necessity.

Minute Order No. 22 itself shows that there was no notice to CAB carriers or other interested parties, that no party was afforded the opportunity to appear or present evidence and that no hearing was held. The order was merely a device by which the TAC intended to "keep track" of the airports being used by its carriers. It obviously was not intended to be a determination of the public convenience and necessity with respect to the use of Love Field by Southwest and the court's interpretation was most clearly not permissible under the controlling state law. TAC hardly observed "the limitations which it [state law] imposes upon the exercise of the authority which it gives." *United States v. Lee*, 106 U.S. 196, 220.

---

[33] "Any other provision of this Act notwithstanding, carriers certificated by the Civil Aeronautics Board pursuant to the Federal Aviation Act of 1958, as now or hereafter amended, together with any other interested party shall be afforded the right to appear and present evidence and arguments at such hearings on all issues involved in any such hearing held under the provisions of this Act. The final determination of such application shall be made by the Commission by written order setting forth its findings and served upon the parties in such manner as the Commission shall specify, and such application may be granted or denied, in whole, or in part: provided, however, any service not specifically authorized shall be deemed specifically denied." Vernon's Ann. Civ. St., Art. 46c-6, Sub. 3(c) (1974 Supp.).

CONCLUSION

Congress has established a pervasive and complete federal scheme for airspace management and for the planning, funding and regulation of uses of public airports, the National Airport System Plan. Dallas and Fort Worth, acting under and in cooperation with the FAA and CAB decisions to implement the federal statutory scheme, have constructed the world's largest airport at a cost in excess of one billion dollars and assigned specified air uses to that one airport as it is integrated into the Dallas-Fort Worth complex of airports, and the National Airport System Plan. The court below, by failing to recognize federal pre-emption, by failing to defer to the primary jurisdiction of the federal agency charged with the responsibility of implementing this federal plan, and by erring in their conclusions of state law, has not only nullified the Dallas-Fort Worth Regional Airport Project and burdened interstate commerce. It also has effectively nullified a major part of the National Airport System Plan.

Finally, the state order, which was interpreted below as giving one intrastate airline a right in "perpetuity" to use an airport, was issued without notice, hearing, evidence, or record, all in violation of elementary principles of due process.

For the reasons stated, petitioners pray that this

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

N. ALEX BICKLEY, City Attorney
City of Dallas, Texas
501 City Hall
Dallas, Texas 75201

S.G. JOHNDROE, JR., City Attorney
City of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

LEE E. HOLT, Legal Counsel
Dallas-Fort Worth Regional
Airport Board
P.O. Drawer DFW
Dallas-Fort Worth Airport
Texas 75261

ERWIN N. GRISWOLD
JAMES M. BURGER
Reavis, Pogue, Neal and Rose
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

SUPREME COURT, U.S. LIBRARY

FILED
SEP 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS,
THE CITY OF FORT WORTH, TEXAS,
AND THE DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD,

Petitioners,

v.

SOUTHWEST AIRLINES CO., and
TEXAS AERONAUTICS COMMISSION,

Respondents.

APPENDIX

N. ALEX BICKLEY, City Attorney
City of Dallas, Texas
501 City Hall
Dallas, Texas 75201

S. G. JOHNDROE, JR., City Attorney
City of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

LEE E. HOLT, Legal Counsel
Dallas-Fort Worth Regional
Airport Board
P.O. Drawer DFW
Dallas-Fort Worth Airport
Texas 75261

ERWIN N. GRISWOLD
JAMES M. BURGER
Reavis, Pogue, Neal and Rose
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
Appendix A, Opinion of the Court of Appeals	1a
Appendix B, Opinion of the District Court	1b
Appendix C, Order of the Civil Aeronautics Board, No. E-21341, Sept. 30, 1964	1c
Appendix D, Texas Municipal Airports Act	1d
Appendix E, Texas Aeronautics Commission Act	1e
Appendix F, Federal Airport Act of 1946	1f
Appendix G, Federal Aviation Act of 1958	1g
Appendix H, The Airport and Airway Development Act of 1970	1h

APPENDIX A

The CITY OF DALLAS, TEXAS, the City of Fort Worth, Texas, and the Dallas-Fort Worth Regional Airport Board, Plaintiffs-Appellants,

v.

SOUTHWEST AIRLINES CO., Defendant-Appellee, and Texas Aeronautic Commission, Intervenor-Appellee.

No. 73–2478

United States Court of Appeals, Fifth Circuit.

May 31, 1974.

Appeal from the United States District Court for the Northern District of Texas.

Before ALDRICH, Senior Circuit Judge,* and BELL and GEE, Circuit Judges.

GEE, Circuit Judge:

This is a suit for declaratory judgment brought by the cities of Dallas and Fort Worth and their joint agent, an airport board created by intercity compact, to determine their right to close Dallas' Love Field to scheduled passenger service by a state-certificated, intrastate commuter line, Southwest Airlines Co. From

*Hon. Bailey Aldrich, Senior Circuit Judge of the First Circuit, sitting by designation.

a judgment that, so long as Love Field remains open as an airport, appellants may not exclude Southwest from it, plaintiffs appeal. We affirm.

Dailas and Forth [sic] Worth, large cities in north-central Texas about thirty miles apart, have been rivals over the years. Perhaps partly as a result of this, each developed its own airport. These lie more or less between the two cities and are themselves only twelve miles apart. In consequence of federal Civil Aeronautics Board hearings commenced in 1962, the cities were given to understand that, if they were unable to agree within a reasonable time on a single port for interstate air service to the Dallas-Fort Worth area, the CAB felt obliged to designate one.

The handwriting being thus upon the wall, the cities found themselves, after all, able to agree. In due course, and with CAB blessing and encouragement, they constructed a new airfield and persuaded all interstate, CAB-certificated carriers then serving the area to agree to move their services there.[1] Southwest, an intrastate commuter line certificated by the Texas Aeronautics Commission to serve Love, did not agree and has refused to move. By various ordinances, the validity and effect of which is our concern here, Dallas has sought to compel Southwest to vacate Love Field.[2]

[1] Despite its contract, Braniff has refused to close operations from Love, and Texas International has now reopened there under the umbrella of a state-court injunction.

[2] The major ordinance which was before the court below and on which it based its decision was the 1968 Regional Airport Concurrent Bond Ordinance. This provides, in pertinent part, that the cities are to phase out Certificated Air Carrier Services to their existing airfields such as Love to the extent "legally permissible" and not in violation of "presently outstanding legal

[1] Were Love Field a private airfield, constructed without public funds, it may be assumed that its owner

commitments or covenants prohibiting such action." The ordinance defines the operations to be phased out as follows:

> " 'CERTIFICATED AIR CARRIER SERVICES' mean aircraft operations of the following types when operating on a regular and continuing basis, to wit:
>
> "(1) interstate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Civil Aeronautics Board of the United States of America or any successor agency thereto;
>
> "(2) services conducted by foreign air carriers according to published flight schedules holding permits or similar evidences of authority issued by the Civil Aeronautics Board or any successor agency thereto or by any other agency or department of the United States of America; and
>
> "(3) intrastate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Texas Aeronautics Commission of the State of Texas or by any successor agency.
>
> "It is provided, however, that this term shall not include services provided by commercial 'air taxi' operators meeting the requirements for exemption provided from time to time by any rules and regulations of the Civil Aeronautics Board, by the Texas Aeronautics Commission or by any other agency of the United States of America or the State of Texas having jurisdiction to provide such exemptions."

Southwest urges, and the court below found, that the ordinance is artfully worded to eliminate its intrastate scheduled service only, since Texas does not regulate intrastate service of CAB-certificated interstate carriers and the ordinance does not require that these be moved. This seems correct, since none of the intrastate runs of Southwest's interstate competitors is certificated by the TAC and hence (3) of the above ordinance, while applying to Southwest, has no effect on them. At oral

could exclude anyone he liked. Love, however, received substantial federal assistance and therefore must ". . . be available for public use on fair and reasonable terms and without unjust discrimination; . . . ." 49 U.S.C. §1718(1), formerly 49 U.S.C. §1110. In addition, the Supreme Court of Texas long ago held that a Texas Home Rule municipality might not, by denying to common carriers use of its streets built in part at state and federal expense, interfere with their use of state highways passing through the city. Such actions were seen, in their extra-municipal effect, as going beyond the power of local government. City of Arlington v. Lillard, 116 Tex. 446, 294 S.W. 829 (1927); City of Fort Worth v. Lillard, 116 Tex. 509, 294 S.W. 831 (1927). The analogy seems close and valid.

[2] Appellant cities urge that reasonable classification of *uses*—as distinguished from selection of *users*—does not consitutute unjust discrimination.[3] We assume, without deciding, that this is so.[4]

---

argument, this Court commented somewhat on this curious and unpleasant feature of the ordinance.

Thereafter, both cities enacted and furnished to us ordinances closing their individual municipal airports to a broader range of uses. Dallas' provides, in pertinent part:

"From and after May 1, 1974, Dallas Love Field and Redbird Airport will be closed to all regularly scheduled flights of aircraft that transport passengers or property for hire, except regularly scheduled flights of aircraft that transport passengers or property for hire between only Dallas Love Field or Redbird Airport and Dallas/Fort Worth Regional Airport."

Even so, we note that charter passenger flights by any size or type of plane remain untouched.

[3]See Aircraft Owners & Pilots Ass'n v. Port Authority of N.Y., 305 F.Supp. 93 (E.D.N.Y. 1969).

[4]If it is not so, then clearly neither Dallas nor any other authority can require Southwest to move from Love so long as it remains open to *any* use by aircraft.

If so, the question becomes, as to Texas intrastate flights, who is to make these just discriminations by use-classification?[5] It has a simple answer. In a recent decision, the Texas Supreme Court had occasion to consider the powers of the Texas Aeronautics Commission. It first correctly noted:

> In all matters of flying safety, such as the air worthiness of the aircraft and the skill of its operators, Air Southwest would be regulated by the Federal Aviation Agency. All Air Southwest aircraft and pilots would have federal certificates. However, by flying only in intrastate commerce and by not interlining with any CAB certificated carrier, making no connection for passengers or baggage, Air Southwest will not require a certificate from the federal agency in charge of economic regulations, the Civil Aeronautics Board. Congress has not pre-empted the field of the economic regulation of air carriers, and the states have the power to act so long as there is no conflict with federal law. 49 U.S.C.A. §1301(3) and (10), and §1371; Western Air Lines Inc. v. California, 42 Cal.2d 621, 268 P.2d 723 (1954), cert. denied, 348 U.S. 859, 75 S.Ct. 87, 99 L.Ed. 677; *see* Island Airlines, Inc. v. C.A.B., 331 F.2d 207 (9th Cir. 1964); Island Airlines, Inc. v. C.A.B.,

---

[5] As to interstate flights, of course it would be the CAB, which appellants admit is authorized to, and does, designate points of origin and destination. The CAB has not, however, undertaken to assert jurisdiction, if any it has, over purely intrastate carriers such as Southwest, and indeed appears presently to acquiesce in state licensing of intrastate portions of interstate routes. See People v. Western Airlines, Inc., 42 Cal.2d 621, 268 P.2d 723, appeal dismissed, 348 U.S. 859, 75 S.Ct. 87, 99 L.Ed. 677 (1954).

363 F.2d 120 (9th Cir. 1966); Comment, 47 Texas L.Rev. 275 (1969).

Our Brethren of the District of Columbia Circuit emphatically agree and have so held in a case involving this general controversy. Texas Int'l Airlines, Inc. v. C.A.B., 154 U.S.App. D.C. 113, 473 F.2d 1150 (1972). And having determined that regulatory power over Texas intrastate air carriers still reposed with the State of Texas, the Texas Court futher noted:

> The decision as to where the public interest lies and what air service is best for Texas must be made by the Texas Aeronautics Commission.
>
> Texas Aeronautics Comm'n v. Braniff Airways, Inc., 454 S.W.2d 199 (Tex.Sup.1970).

[3-6] The power to designate "routes" has, from times antedating any relevant to this case, been confided to that Commission,[6] It seems self-evident that points of origin and destination are part of every "route," particularly short-haul ones.[7] Indeed, to hold that a city could deny the use of public facilities to an airline certificated to it by the Texas Aeronautics Commission would cripple, if not destroy, the Commission's powers to control intrastate routes.[8] Any city having only municipal airports would have an absolute veto power over routes to and through it—routes which

[6] Art. 46c–6, sub. 3, Vernon's Ann.Texas St., as amended.

[7] The Attorney General of Texas has ruled that the Commission's powers extend to routes entirely *within* one city. Op. Att'y Gen'l of Texas, September 2, 1969. Here, little but designating points of take-off and landing is involved.

[8] Cf. City of Arlington v. Lillard, 116 Tex. 446, 294 S.W. 829 (1927); City of Fort Worth v. Lillard, 116 Tex. 509, 294 S.W. 831 (1927). Town of Ascarate v. Villalobos, 148 Tex. 254, 223 S.W.2d 945 (1949), is not to the contrary in upholding, as it does, reasonable regulation by the municipality of pickup and discharge points within the town for passengers of state-certified buslines.

involve the convenience and necessity of the state public, not merely that of the city. And a partial veto would exist even where other facilities existed. Southwest has been certificated by the Commission into Love Field and directed to continue service there until told otherwise. At a minimum, this constitutes Texas' exercise of its power to determine that Southwest's is not an improper use of Love Field. Dallas being Texas' creature, it may not declare otherwise.[9] The cities' road to relief passes by the Texas Aeronautics Commission. They cannot reroute it by enacting ordinances in varying forms of words on a subject which is beyond their powers.[10]

Other grounds are urged in support of the judgment of the court below, including the asserted discriminatory effect on Southwest of the 1968 Regional Airport Concurrent Bond Ordinance noted at footnote 2 above and the effect of covenants in outstanding airport revenue bonds that Love will be kept open for scheduled airlines and general use so long as the bonds are unpaid. In view of our disposition of the case, we think it unnecessary to discuss these.

Affirmed.

---

[9]Dallas is a Home Rule City. The Texas Constitution, Art. 11, §5, provides that no ordinance of such a city may be inconsistent with the State's general laws. Such a law is the Texas Municipal Airports Act, which grants to municipalities power to establish and control the use of airports, but provides in the same breath:

> "No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, *or to any regulations promulgated or standards established pursuant thereto.*" (footnote omitted; emphasis added)

Art. 46d–7, V.A.T.S.

[10]The question whether an ordinance entirely closing Love Field to air traffic would be within Dallas' powers is not presented here, and we, of course imply no view upon it.

APPENDIX B

The CITY OF DALLAS, TEXAS et. al.,
Plaintiffs,
v.
SOUTHWEST AIRLINES COMPANY,
Defendant,
Texas Aeronautics Commission,
Intervenor Defendant.
No. CA 3-5927-C.

United States District Court,
N.D. Texas,
Dallas Division.
June 12, 1973.

MEMORANDUM OPINION

WILLIAM M. TAYLOR, Jr., Chief Judge.

This case involves the right of access of Southwest Airlines Co. (hereinafter sometimes referred to as "Southwest") to Love Field, a public airport owned and operated by the City of Dallas, Texas. Plaintiffs, the City of Dallas, the City of Fort Worth, and the Dallas-Fort Worth Regional Airport Board, seek a declaratory judgment, pursuant to 28 U.S.C. Sec. 2201, declaring their right under federal and state law to exclude Southwest, a purely intrastate air carrier, from Love Field on and after the opening of the new Dallas-Fort Worth Regional Airport. The Regional Airport, which is scheduled to open in the fall of 1973, is a joint undertaking by the Cities of Dallas and Fort Worth, each of which presently owns and operates its own airports. Plaintiff, the Regional Airport Board, is

an administrative body, created by contract and agreement between the cities, to which the cities have delegated certain operating powers over the Regional Airport. In conjunction with their joint effort on the Regional Airport, the Cities of Dallas and Fort Worth have covenanted to phase-out all Certificated Air Carrier Services (as defined in their 1968 Concurrent Bond Ordinance) at their respective wholly owned airports, including Love Field, to the extent that they may legally do so, and to transfer such services to the new Regional Airport upon its completion.

Defendant, Southwest, has answered and counter-claimed against the Cities and the Regional Airport Board seeking, pursuant to 28 U.S.C., Sec. 2201 and Sec. 2202, a declaration of its right under federal and state law to remain at Love Field and an injunction to protect that right. The Texas Aeronautics Commission (hereinafter sometimes referred to as the "TAC"), the state agency charged with the economic regulation of intrastate air carriers, has intervened as a Defendant in this case, adopting the contentions of Southwest Airlines and specifically urging that the attempted ouster of Southwest from Love Field usurps the TAC's exclusive regulatory power over the intrastate air carriers; is invalid under state law; and is contrary to, and beyond the scope of, the powers delegated to Texas Home Rule cities by the State of Texas.

Jurisdiction in this case is founded on the existence of a Federal question and the amount in controversy, 28 U.S.C., Sec. 1331; on an act of Congress regulating commerce, 28 U.S.C. Sec. 1337; on 28 U.S.C., Sec. 1343(3) and (4); and on the pendent jurisdiction of the Court. The Federal causes of action arise under the

Federal Aviation Act of 1958, 49 U.S.C., Sec. 1301 et seq.; the Civil Aeronautics Act of 1938, 49 U.S.C., Sec. 401 et seq.; the Airport and Airways Development Act of 1970, 49 U.S.C., Sec. 1701, et seq.; the Federal Airport Act , 49 U.S.C., Sec. 1101, et seq.; 42 U.S.C., Sec. 1983 and Sec. 1985(3); and the Fifth and Fourteenth Amendments to the United States Constitution. The state causes of action are based on the Texas Aeronautics Act, Art. 46c-1 et seq., Vernon's Ann.Civ.St.; on the Municipal Airports Act, Art. 46d-1 et seq., V.A.C.S.; and on the Texas Constitution. The state causes of action are based on a common nucleus of operative fact with the Federal causes of action.

For many years the Cities of Dallas and Fort Worth were engaged in a fierce, intense and sometimes bitter rivalry for the business of commercial aviation and commercial air carriers. Dallas enlarged and improved its Love Field, which is approximately five to six miles north-northwest of the downtown business district of the City and Fort Worth, rather than undertaking the enlarging and improving of its inadequate Meacham Field, which is approximately five to six miles north of downtown Fort Worth, constructed a fine large airport, now known as Greater Southwest International Airport (GSIA), midway between the two cities. The downtown business districts of Dallas and Fort Worth are about 31 miles apart, and the two cities with the passage of time have grown, extended their limits, and in some places are almost contiguous. Only 12 miles separate Love Field and GSIA. Serving two airports which were so close together resulted in unnecessary expense to the carriers as well as the taxpayers and inadequate and incomplete air service to both cities. Happily, the two cities

have now joined hands and are well on the way to the construction of what promises to be the finest airport in the world. The two cities joined together in the bringing of this lawsuit. This congenial alliance was not exactly the result of a shotgun wedding but more than a gentle nudge was provided by the Federal Government's Civil Aeronautics Board, hereinafter sometimes referred to as CAB, which in August of 1962 instituted an investigation known as the Dallas-Fort Worth, Texas Regional Airport Investigation, Docket No. 13959, for the purpose of determining whether or not the certificates of public convenience and necessity of interstate airlines under the CAB's jurisdiction should be amended so as to designate a specific airport as the single point through which all interstate air carrier service to Dallas and Fort Worth must be provided. Finally, after many hearings, the CAB in 1964 entered an interim order giving the two cities a period of 180 days in which to arrive at a voluntary agreement to designate the single airport through which the CAB-regulated carriers would serve the Dallas-Fort Worth area. It indicated that if the parties were unable to agree on the designation of the airport to serve the area, it would then proceed to issue a final determination and amend the certificates of the interstate "air carriers" under its jurisdiction so as to cause them to serve either Love Field or Fort Worth's GSIA. The CAB has entered no further orders in the investigation and none of the certificates of the carriers under CAB jurisdiction have been amended.

Rather than designating an existing municipal airport to serve the Dallas-Fort Worth area, the cities agreed to construct and operate a new regional airport to be

located approximately mid-way between Dallas and Fort Worth at Grapevine, Texas. Thereafter, on November 11 and 12, 1968, the the cities jointly adopted the 1968 Regional Airport Concurrent Bond Ordinance authorizing the issuance of Dallas-Fort Worth Regional Airport Joint Revenue Bonds for the financing of the new airport. The 1968 Ordinance provides, among other things, that the cities:

> "... shall take such steps as may be necessary, appropriate and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly and efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operation at the Regional Airport." Section 9.5.

The Ordinance also provides, in Section 9.5, for a waiver of the phase-out provision if eight (8) members of the eleven (11) member Regional Airport Board determine that a waiver is necessary "(1) in the interest of the public safety; (2) in the interest of prudent and efficient operations at the Regional Airport; or (3) in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region considered as a whole." In addition, the Ordinance specifies that if the grant of a waiver by the Regional Airport Board results in a reduction in Regional Airport revenues, the city benefiting from the waiver must pledge to transfer back to the Regional Airport such amount as will justly compensate such Airport for its loss of revenue.

In early 1970, in order to insure that sufficient revenues would be available to maintain and operate the Regional Airport and to meet all debt service requirements on the Airport Revenue Bonds, the Regional Airport Board executed Letters of Agreement with the eight (8) CAB certificated air carriers then serving the Dallas-Fort Worth area.[1] These letter agreements provide that each signatory airline will "... move all of its Certificated Air Carrier Services serving the Dallas-Fort Worth area to the Airport ... to the extent required under the terms of the 1968 Regional Airport Concurrent Bond Ordinance." Each of the CAB carriers also contracts "to pay rentals, fees and charges for its use, operations and occupancy of the Airport premises and facilities and the services appertaining thereto in an amount which, together with the rentals, fees and charges paid by other Airlines and others using the Airport premises and facilities, will be sufficient to produce total gross revenues required to satisfy the Airport Board's obligation..." to collect each year monies sufficient to maintain and operate the Airport, plus 1.25 times the debt service requirements on the Regional Airport revenue bonds, and plus an amount equal to any other obligations required to be paid from the revenues of the Airport.

On June 18, 1971, after some three and one-half years of hearings, litigation, and appeals occasioned by competitive CAB certificated air carriers, Defendant, Southwest Airlines Co. commenced its purely intrastate

[1]These air carriers are American Airlines, Inc.; Braniff Airways, Incorporated; Continental Airlines, Inc.; Delta Air Lines, Inc.; Eastern Air Lines Incorporated; Frontier Airlines, Inc.; Ozark Air Lines, Inc.; and Texas International Airlines, Inc.

operations, as a "commuter airline" between Love Field, Dallas, and Houston and San Antonio, pursuant to Certificate of Public Convenience and Necessity No. 22 issued by the Texas Aeronautics Commission (TAC). Southwest's Certificate stated that it was authorized to serve the Dallas-Fort Worth region through "any" airport in the area. On November 12, 1971, however, the TAC issued a general order and regulation, styled "Minute Order No. 22," which directed all TAC certificated airlines not to change the airports from which they were then conducting their intrastate services unless they first obtained written approval from the TAC to do so. On and before November 12, 1971, Southwest was operating from Love Field, as it continues to do today.

On October 20, 1971, Southwest Airlines formally advised the Regional Airport Board that it intended to stay at Love Field when the eight (8) CAB certificated airlines moved their operations from Love Field to the Regional Airport. Southwest also withdrew from its brief participation in planning sessions regarding the transfer of services from Love Field to the Regional Airport, and declined to execute the letter agreement with the Airport Board that had previously been signed by the CAB carriers.

On March 6, 1972, Southwest Airlines filed with the Regional Airport Board an instrument called a "Petition for Exemption, or Alternatively, Application For Waiver," by which it sought a determination from the Airport Board that Southwest was not required by the 1968 Concurrent Bond Ordinance, and could not lawfully be required to move to the Regional Airport, or, alternatively, that a waiver of the transfer requirement

should be granted under Section 9.5(A) of the Ordinance on the basis of an "overriding public need." After holding this Petition for three months without acting upon it, the Airport Board decided on June 6, 1972, that the CAB rulings in the Dallas-Fort Worth Regional Airport Investigation deprived the Airport Board of jurisdiction to consider and act upon Southwest's Petition. That same day the two Cities and the Airport Board filed their Complaint against Southwest, commencing this lawsuit.

[1] Among other contentions Plaintiffs argued in the Complaint that they were required by the rulings of the Civil Aeronautics Board in the Dallas–Fort Worth Regional Airport Investigation to transfer all certificated air carrier services to the new Regional Airport, including the intrastate services of Southwest Airlines. While Plaintiffs seem to have abandoned this position in their closing arguments and brief, the Court, nevertheless, finds their contention in this regard without merit because, among other reasons: (1) the Civil Aeronautics Board has no jurisdiction over a purely intrastate airline such as Southwest; (2) it never attempted to assert any such jurisdiction in its interlocutory orders entered in the Regional Airport Investigation; (3) it has jurisdiction only over "air carriers" engaged in "interstate air transportation"; and (4) it has no jurisdiction over cities or their airports, as such.

[2-4] Pursuant to the Federal Aviation Act of 1958, the Civil Aeronautics Board is authorized to exercise regulatory jurisdiction *only* over air carriers engaged in "interstate air transportation" as that term is defined in

the Act.[2] Western Air Lines, Inc. v. California, 42 Cal.2d 621, 268 P.2d 723 (1954), appeal dismissed, 348 U.S. 859, 75 S.Ct. 87, 99 L.Ed. 677. Because Southwest does not engage in, and is not authorized to engage in, "interstate air transportation," the CAB itself has held that it has no jurisdiction over Southwest Airlines (then known as "Air Southwest Co."). See CAB orders 71-6-79 and 71-9-23 (1971), in Texas International Airlines, Inc. v. Air Southwest Co., Docket 23047, and Braniff Airways, Inc. v. Air Southwest Co., Docket 23122. The CAB's position that it lacks jurisdiction over Southwest has been repeatedly upheld by the Courts. Texas International Airlines, Inc. v. CAB, 154 U.S.App.D.C. 113, 473 F.2d 1150, 1152 (1972); Braniff Airways, Inc. v. CAB, *ibid*; Texas Aeronautics Commission v. Braniff Airways, Inc., 454 S.W.2d 199, 200 (Tex. Sup.1970), cert. denied, 400 U.S. 943, 91 S.Ct. 244, 27 L.Ed.2d 247 (1970). Under the law, no orders or rulings by the Civil Aeronautics Board in the Dallas-Fort Worth, Texas, Regional Airport Investigation could be binding on, or in any way applicable to, Southwest Airlines. Furthermore, there is

[2]The Federal Aviation Act defines "interstate air transportation" as "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

> "(a) a place in any State of the United States . . . and a place in any other State of the United States . . .; or between places in the same State of the United States through the airspace over any place outside thereof . . ." 49 U.S.C. Sec. 1301(21).

Southwest Airlines does not carry any mail. It does not fly between Texas and any other State. It does not fly through any airspace outside of the State of Texas.

nothing in the language of the CAB orders which would indicate that any of them were directed to intrastate airlines such as Southwest.[3]

[3]As used in the CAB Orders, "air carrier" is a term of art and not of general description. It is defined in 49 U.S.C. Sec. 1301(3) to mean "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in *air transportation* . . ." (emphasis added).

"*Air transportation,*" in turn, is defined as "*interstate,* overseas, or foreign air transportation or the transportation of mail by aircraft." 49 U.S.C. Sec. 1301(10) (emphasis added). The Court finds no indication that the CAB in its Orders intended to apply the term "air carriers" to purely intrastate airlines, i.e., in a manner at variance with the definition of that term in the Federal Aviation Act.

Defendant Southwest has also contended, in answer to Plaintiffs' argument of federal compulsion arising from the CAB Orders in the Dallas-Fort Worth Regional Airport Investigation, that such Orders are non-coercive, speaking only in terms of a "voluntary agreement" between the Cities; that the CAB's power to designate a single airport for the Dallas-Fort Worth area derives not from any CAB power over the Cities of Dallas and Fort Worth, but solely from the CAB's power to amend the certificates of public convenience and necessity of the CAB carriers, which certificates remain unamended to this date; and, finally, that Plaintiffs themselves admit in their Complaint that "no order terminating the investigation has ever been entered and the entire proceeding remains open to this date, and under the continuing jurisdiction of the Civil Aeronautics Board." Southwest argues that, under these circumstances, the CAB has not yet actually ordered any airline, interstate or intrastate, to leave Love Field, and, consequently, that there is no substance to Plaintiffs' argument that they are seeking to exclude Southwest pursuant to CAB Orders. Southwest has also pointed out that it has never been accorded either notice or hearing with respect to the Regional Airport Investigation, and that, consequently, any application to Southwest of Orders emanating from that

[5] Plaintiffs' next agrument rests on the premise that the CAB has ordered all CAB "air carriers" to move to the Regional Airport, and that, since Love Field and the Regional Airport have both received federal funds pursuant to federal airport aid programs, the Plaintiffs are required to exclude Southwest from Love Field in order to avoid unjustly discriminating against the CAB carriers in violation of 49 U.S.C. Secs. 1110 and 1718.[4] This argument misconceives the

---

Investigation would be in direct violation of the Federal Aviation Act, 49 U.S.C. Sec. 1371(g), as construed in American Airlines, Inc. v. Civil Aeronautics Board, 123 U.S.App.D.C. 310, 359 F.2d 624 (1966), cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75; the Administrative Procedure Act, 5 U.S.C. Secs. 554 and 556; and the Fifth and Fourteenth Amendments to the United States Constitution, see Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 81 S.Ct. 1611, 6 L.Ed.2d 869 (1961). Although the Court is of the opinion that each of these contentions is valid, it does not deem it necessary to discuss them extensively in light of its conclusion that the CAB Orders were not directed to purely intrastate airlines and its further conclusion that the CAB lacks jurisdiction over Southwest.

[4]The Federal Airport Act, 49 U.S.C. Sec. 1110, provided in pertinent part:

> "The Administrator shall receive assurances in writing, satisfactory to him, that -
>
> "(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination."

This provision was subsequently transferred to, and now appears in, the Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1718, which provides:

> "As a condition precedent to his approval of an airport development project under this subchapter, the Secretary

function, purpose, and application of the federal anti-discrimination statutes.

[6] The federal prohibition against unjust discrimination is designed to insure that the *airport owner or operator* (referred to as the "sponsor" in both the statutes and the grant agreements) provides potential users of the airport with a fair and nondiscriminatory "opportunity" to use its facilities, provided the user can lawfully do so. If the potential user cannot, or does not, choose to avail itself of the "opportunity" to use the airport, the airport operator is obviously not required to exclude those who can and do choose to use such facilities. Therefore, even if the Plaintiffs were correct in arguing that the CAB has excluded the intrastate carriers from Love Field, there would still be no merit to their contention that, consequently, they must eject Southwest Airlines. The forbidden discrimination can occur only as between parties that are legally able to serve Love Field and are desirous of so doing. To hold otherwise would lead to exceedingly incongrous results.

Suppose, for example, the reverse situation existed and a state regulatory agency had ordered an airline under its jurisdiction to cease operations at a particular airport. Under Plaintiffs' view of the law, the airport owner would then be required by federal law to

---

shall receive assurances in writing, satisfactory to him, that –

"(1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination;"

As discussed more fully hereafter, Dallas has received federal aid pursuant to both statutes.

exclude all CAB carriers who remained there. Similarly, suppose the CAB ordered some carriers under its jurisdiction to leave Love Field, but not others. Under Plaintiffs' argument, the airport operator would then have to exclude the remaining carriers in order not to discriminate against those that had been ordered to leave. Presumably, the same line of reasoning would apply to voluntary abandonments by airport users. Obviously, the Congress did not intend so bizarre an interpretation of its anti-discrimination statutes. The Court concludes that the removal of Southwest Airlines is not required by any prohibition against unjust discrimination.

[7] The Plaintiffs have similarly contended that allowing Southwest to use Love Field, after the opening of the Regional Airport, would violate 49 U.S.C. Sec. 1349(a), which provides:

> "There shall be no exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended."

In interpreting this Statute, the Federal Aviation Administration has pointedly observed:

> "The presence on an airport of one person engaged in an aeronautical activity as herein defined will not itself be considered a violation of this policy if there is no intent by express agreement, imposition or unreasonable standards or requirements, or by any other means to exclude others. This would occur when the volume of business may not be sufficient to attract more than one person. *As long as the opportunity to engage in an aeronautical activity is available to those meeting the reasonable qualifications and standards relevant to such activity, the fact that only one person takes*

advantage of the opportunity does not constitute the grant of an exclusive right." (emphasis added) 30 F.R. 13, 661.

The Plaintiffs have again attempted to use a statute to justify conduct which that statute expressly prohibits. If the CAB carriers are precluded from serving Love Field after the opening of the Regional Airport, such preclusion results from action by the CAB, which has no jurisdiction over Southwest, or from the voluntary Letter Agreements between the Plaintiffs and the CAB carriers. The CAB carriers have not been excluded from Love Field by the *Plaintiffs*, and, therefore, Southwest's presence at Love Field after the opening of the Regional Airport can in no way be considered the prohibited grant of an exclusive right. Southwest has not voluntarily relinquished its right to serve Love Field and that right has not been limited or restricted by any regulatory agency with authority over Southwest.

[8] Plaintiffs next argue that the Regional Airport is part of the National Airport System Plan and is "totally consistent with" the Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1701 et seq. Plaintiffs appear to argue that since they have received $60,848,031.27 in federal funds from the Federal Aviation Administration for the Regional Airport, and the Secretary of Transportation has acted jointly with the Cities of Dallas and Fort Worth in planning the Regional Airport, the actions of the two Cities are somehow rendered immune from, or supreme to, the law.

The Court notes preliminarily that the Airport and Airway Development Act was passed by Congress in

1970, five years after the Plaintiffs had received FAA Commitments for the Regional Airport Project and two years after the enactment of the 1968 Ordinance which required the termination of Certificated Air Carrier Services at Love Field upon the opening of the Regional Airport. Whether or not Plaintiffs' actions herein are "consistent" with this subsequent federal legislation is immaterial. The important consideration, and the one which is fatal to Plaintiffs' contention in any and all events, is that the Airport and Airway Development Act could not have authorized the phase-out provision of the 1968 Ordinance. That Act, while containing a prohibition against unjust discrimination by airport owners receiving federal funds, see 49 U.S.C. Sec. 1718, and while establishing a mechanism for the disbursement of such funds, does not confer upon either the Federal Aviation Administration or the Plaintiffs herein any economic regulatory power over air carriers. The purpose of the Act is to promote the planning and construction of airports, not to confer upon cities the power to decide the routes of air carriers, which involves determinations of public convenience and necessity.[5] It should also be men-

[5]Nothing herein is intended to imply that the FAA may not exclude particular aircraft from an airport pursuant to its power to regulate safety in civil aeronautics; see Subchapter VI of the Federal Aviation Act of 1958, 49 U.S.C. Secs. 1421-1430. However, as testified to by Mr. Henry Newman, the Regional Administrator of the FAA, there are no safety considerations which require the exclusion of Southwest Airlines from Love Field at this time and there are no foreseeable safety problems at Love Field after the opening of the Regional Airport. Therefore, the Court concludes that matters of safety are not involved in this case.

Mr. Newman also sponsored an Environmental Impact

tioned that the only funds allotted to the Cities of Dallas and Fort Worth under this Act have been allocated to the Regional Airport and not to Love Field. Plaintiffs have not shown that the FAA has taken any action under the Act with respect to Love Field.

[9] Finally, Plaintiffs apparently contend that if Southwest Airlines is permitted to remain at Love Field after the opening of the Regional Airport, the ability of the Regional Airport Board to operate that Airport and to retire the outstanding debt on the Airport Revenue Bonds will be jeopardized due to diversion of needed revenue to Love Field. It is not seriously argued by Plaintiffs that the revenues from Southwest Airlines' three present aircraft and the passengers they carry are, in and of themselves, essential to the operation of the Regional Airport. Instead, Plaintiffs maintain that Southwest's continued presence at Love Field will, to some extent, induce the CAB carriers to retain service there (an argument that Southwest has characterized as the "domino theory") and that the cumulative loss of revenue from Southwest *and* these other carriers will have a significant impact on the financial security of the Regional Airport.

In the opinion of the Court, the following evidence, among other items, demonstrates that Plaintiffs have overstated their fears concerning the financial impact upon the Regional Airport of Southwest's remaining at Love Field.

Statement which pertained to the Regional Airport, rather than to Love Field, and which was adopted five years after the FAA had committed funds to the Regional Airport. The relationship of this Statement to Southwest's right to remain at Love Field was never explained or pressed by Plaintiffs, and no environmental issues relevant or material to this matter were ever raised by Plaintiffs.

1. The eight (8) CAB carriers executing the Letter Agreements have agreed to pay any deficit resulting from the operation of the Regional Airport, including 1.25 times the annual debt service on the Regional Airport Revenue Bonds. Plaintiffs' Exhibits purporting to show diversion of funds from the Regional Airport to Love Field in fact show that the Regional Airport receives the same amount of revenues annually whether Southwest Airlines is there or at Love Field. Any diversion which occurs constitutes, at most, an added cost to the CAB carriers. It does not penalize the Regional Airport Board or the citizens of Dallas and Fort Worth.

2. The outstanding Love Field "Senior Lien Bonds" are a first lien upon Regional Airport revenues and must be paid even before the Regional Airport Revenue Bonds themselves. Thus, any revenue generated at Love Field by Southwest Airlines defrays the costs and expenses of the Regional Airport, if the income from Love Field is insufficient to pay *its* maintenance and operating expenses and debt service.

3. The Plaintiffs' "diversion" exhibits were basically predicated upon the assumption that *all* Dallas/Fort Worth intrastate air service would be provided through Love Field if Southwest Airlines remained there. It was forceably demonstrated by Defendants that this assumption was erroneous and that the "diversion" figures in question were therefore overestimated. Plaintiffs' own conduct and opinions confirm this. First Southwest Company, an investment banking firm under contract to the Regional Airport Board as its financial advisor, gave its written opinion on March 10, 1972, that Southwest Airlines' refusal to go to the new

airport was not a fact of any material financial significance to the $112 million in revenue bonds issued on March 29 of that year, and Thomas Sullivan, the Executive Director of the Regional Airport Board, concurred in that judgment in a written opinion of March 16, 1972, pointing out that the new airport had never included any projected revenues from Southwest Airlines in its own revenue projections. Similar statements of lack of "materiality" were made in the Official Statements pertaining to bonds issued significant to the institution of this lawsuit and were concurred in by Mr. Decker Jackson of First Southwest Company during his testimony.

Although not pleaded by Plaintiffs, this Court is not indifferent to the financial needs of the Regional Airport. However, the evidence which Plaintiffs have presented on this point is at best inconclusive, and its relevance to the fundamental legal issues in this case has never been explained. Financial necessity can neither legitimize an unjust discrimination nor augment the basic powers of municipalities as granted to them by the State. Plaintiffs have wholly failed to establish that Southwest Airlines is required by law to remove its operations to the Regional Airport upon its opening. The Court now turns its attention to the question of whether the Plaintiffs may directly or indirectly exclude Southwest from Love Field when the Regional Airport opens.

[10] It is the conclusion of this Court that none of the Plaintiffs have the power to deny Southwest access to Love Field for any aspect of its operations. It is likewise beyond the power of Plaintiffs, or any of them, to require Southwest to provide any services

through the Regional Airport upon its opening. The bases for this conclusion are numerous, but their number should not detract from the fact that each ground is, in and of itself, sufficient to preclude Plaintiffs from denying Southwest access to Love Field.

[11] Love Field is *public* facility and installation. There is no dispute among the parties to this case that Love Field has over the years been the recipient of federal funds, property and land through various federal aid programs, and that it is subject to federal prohibitions against unjust discrimination and the grant of an exclusive right.[6] In the early 1940's, Love Field was the recipient of federal funds through WPA grants. During World War II, the United States Government enlarged the field, improved the runways, and established various facilities there. Following the War, in 1949 and again in 1955, the United States conveyed equipment, buildings and land to Love Field pursuant to the Surplus Property Act, and in 1950 and 1951 (and by subsequent amendments), grants in aid of approximately $429,603.95 were made to Love Field pursuant to grant agreements between the City of Dallas and the Civil Aeronautics Administration acting under the Federal Airport Act. In addition, the Federal Aviation Administration has spent in excess of $29,000,000 for its general operations at Love Field and for navigational aids. Finally, as previously noted, the Regional Airport has received, since 1966, in excess of $60,000,000 in federal aid pursuant to the Federal Airport Act and the Airport and Airway Development

[6]See 49 U.S.C. Secs. 1110(1) and 1718(1); 50 App. Sec. 1622(g); and 49 U.S.C. Sec. 1349(a).

Act of 1970. In accordance with present FAA policy, the receipt of such aid subjects *all* airports under the operation and ownership of the recipients thereof to the aforementioned statutory prohibitions. See 30 F.R. 13, 661 and grant agreements to the Regional Airport. Since both Dallas and Fort Worth are recipients of federal funds through the grants-in-aid to the Regional Airport, all of their municipal airports are subject to federal restrictions.

In order to properly assess Southwest's argument that its exclusion from Love Field will violate federal law, it is necessary to examine Plaintiffs' present plans for the use of Love Field after the Regional Airport becomes operational.

As discussed above, the 1968 Concurrent Bond Ordinance provides for the phase-out of all "Certificated Air Carrier Services" from Love Field after the opening of the Regional Airport. The term "Certificated Air Carrier Services" is defined in Section 2.1G of the Ordinance as follows:

> "G. 'CERTIFICATED AIR CARRIER SERVICES' mean aircraft operations of the following types when operating on a regular and continuing basis, to wit:
>
> (1) interstate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Civil Aeronautics Board of the United States of America or any successor agency thereto;
>
> (2) services conducted by foreign air carriers according to published flight schedules holding permits or similar evidences of authority issued by the Civil Aeronautics Board or any successor agency thereto or by any other agency or

department of the United States of America; and

(3) intrastate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Texas Aeronautics Commission of the State of Texas or by any successor agency.

It is provided, however, that this term shall not include services provided by commercial 'air taxi' operators meeting the requirements for exemption provided from time to time by any rules and regulations of the Civil Aeronautics Board, by the Texas Aeronautics Commision or by any other agency of the United States of America or the State of Texas having jurisdiction to provide such exemptions."

It should be noted that subsection (3) of the definition of "Certificated Air Carrier Services" clearly includes Defendant herein, Southwest Airlines Co. However, "air taxi" operators are expressly excluded from the definition, and therefore not subject to the phase-out requirement, despite the fact that such operators carry passengers for hire on a scheduled basis; are certificated by the TAC with respect to their intrastate services; and are competitors of Southwest Airlines. Moreover, the phase-out requirement is also inapplicable to all unscheduled charter flights, even when conducted by CAB certificated air carriers; to general aviation (i.e., private and corporate aircraft); and to unscheduled cargo flights, all of which fall outside the definition of "Certificated Air Carrier Services." The purely intrastate services of the eight CAB carriers presently operating at Love Field are likewise outside the scope of the Ordinance, inasmuch as the only intrastate services covered by the Ordinance

are those certificated by the TAC and the intrastate services of the CAB carriers are not so covered. Thus, with respect to intrastate air services, the 1968 Concurrent Bond Ordinance is applicable *only* to Southwest, since, except for the specifically exempted air taxis, Southwest Airlines provides the only TAC certificated intrastate air service to Love Field.

[12] Plaintiffs contend that after the opening of the new Regional Airport, Love Field will become a general aviation facility due to the exclusion of all scheduled commercial operations, and that the classification scheme that has been adopted to accomplish this end is a reasonable one. The Court must disagree.

In the first place, Plaintiffs have not excuded all scheduled commercial operations from Love Field, but have expressly exempted air taxi operators from the phase-out requirement of the Ordinance. Whether the air taxi operators actually choose to remain at Love Field is not important; the controlling consideration is that under the Ordinance they are eligible to do so.

Moreover, the purely intrastate operations of the CAB carriers are also not included in the definition of the air carrier services to be excluded from Love Field. The Ordinance by its express terms phases out air carrier "*services*" (emphasis added). The only *intra*-state air carrier services to which the phaseout provision of the Ordinance applies are those services performed by carriers certificated by the TAC. With respect to carriers certificated by the CAB, however, the only air carrier "services" covered by the Ordinance are *inter*state air carrier services. The Ordinance, therefore, fails to exclude from Love Field any intrastate *services* conducted by the CAB carriers.

Since the phase-out provision of the 1968 Ordinance applies only to intrastate services provided by Southwest Airlines, and not to such intrastate services provided by others, it must be deemed to be unjustly discriminatory.

Once again, what is important in assessing Plaintiffs' contention of reasonableness is whether the purely intrastate services of carriers other than Southwest are actually excluded from Love Field by the Ordinance, not whether by choice, contract, or regulatory order, those carriers will, in fact, operate from the Regional Airport in whole or in part. These considerations inexorably lead the Court to the conclusion that the phase-out provision of the 1968 Concurrent Bond Ordinance would be unjustly discriminatory if applied to Southwest Airlines.

Secondly, even if the classification scheme involved in the 1968 Ordinance accomplished what Plaintiffs contend, this Court would still have to find it unreasonable in other respects.

The evidence shows that after the Regional Airport becomes operational, aircraft of every size and description will be permitted to continue using Love Field. There will be no restriction placed on the frequency of flights at Love, which is presently certificated for I.F.R. and V.F.R. operations and will not be downgraded after the opening of the Regional Airport. Braniff will continue to use its Love Field maintenance base for maintenance work on its fleet. All sizes of planes can use Love Field for ferry flights and refueling stops, and private aircraft of all sizes and kinds will be positively encouraged to use Love Field. Moreover, charter flights carrying passengers for hire on

an unscheduled basis will continue to operate out of Love Field without restriction on the size of the aircraft they may use or on the frequency of their flights. As already noted, the scheduled commuter air services (intrastate and interstate) furnished by air taxi operators will be permitted to continue at Love after the move to Regional. In short, some of the operations to remain at Love Field will use planes larger than Southwest's; some will use planes noisier than Southwest's; some will use planes identical to Southwest's, and, indeed, some of the aircraft operations may be on a scheduled basis and compete in markets which Southwest presently serves. The question before the Court is whether, under these circumstances, Plaintiffs can exclude Southwest from Love Field in the face of the express statutory prohibitions against both unjust discrimination and the grant of an exclusive right to use the facilities of Love Field.

The "unjust discrimination" and "exclusive right" prohibitions were considered in Judge Dooling's decision in Aircraft Owners and Pilots Association v. Port Authority of New York, 305 F. Supp. 93 (E.D.N.Y.1969), a case involving the exaction of a $25.00 fee for General Aviation aircraft landing or taking off during the peak traffic periods at the three major airports in the New York metropolitan area. The suit was brought by owners of private aircraft to invalidate the landing fee on the grounds that it "unjustly discriminated" against general aviation in favor of commercial airlines. While the Court ruled that the landing fee was not unjustly discriminatory on the facts of the case before it, the rationale for its decision makes it abundantly clear that, on the facts of this

case. Plaintiffs have unjustly discriminated against Southwest and have impermissibly granted an exclusive right to use Love Field to those allowed to remain there after Southwest's exclusion.

It is clear from the *Port Authority* opinion that the decisive factor in the Court's ruling was the well-recognized preference which commercial air traffic enjoys over all other classes of aviation. As the Court said:

> "But in any contest that had to be resolved in terms of the public convenience and necessity, a resolution in favor of the mass transportation carriers as against general aviation was the dictate of simple reason." 305 F. Supp. at 108.

The Court's conclusion that a definite preference existed for mass transportation over private aircraft was buttressed by established FAA policy and by the Federal Aviation Act itself. Insofar as that Act was concerned, the Court noted that this preference was justified by 49 U.S.C. Sec. 1304, which states that:

> "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

[13] Since commercial aviation represents the right of a greater number of people to use the navigable airspace of the United States, implementation of the Congressional policy requires a preference for commercial aircraft over private aircraft (and by implication over air cargo).

This preference for commercial aircraft is also supported by FAA regulations, see 33 Fed.Register 17,897, from which the Court quoted extensively in the *Port Authority* opinion. As the FAA stated:

> "When capacity limitations compel a choice, however, the public service offered by the common carrier must be preferred."

The second element which Judge Dooling considered in evaluating the legality of the Port Authority's $25.00 landing fee was whether the imposition of such fee resulted in a reasonable limitation of a particular airport use or the complete exclusion of that use.

In this regard, Judge Dooling made specific note of two points in his discussion concerning the reasonableness of the fee imposed: (1) the fact that the fee was not in effect at all times, but only at certain peak traffic hours; and (2) the fact that even with the imposition of the higher fee, some general aviation activity continued during such peak traffic periods. As the Court observed:

> "The fee schedule, however, . . . does not exclude any General Aviation aircraft from the three major airports either during off-peak hours or even during peak hours." 305 F.Supp. at p. 107.

The Court's care in noting that no outright exclusion of any class of aeronautical use was involved in the case demonstrates that such an outright exclusion, if permissible at all, would certainly bear a heavy burden of justification.

In the case at bar, Plaintiffs have attempted to subject the priorities which were so prominent in the *Port Authority* case to a radical inversion. In place of the preference accorded mass transportation in that case, Plaintiffs herein, in determining who shall have access to Love Field, have preferred private aircraft, corporate jets, unscheduled cargo flights, maintenance flights, and ferry flights over Southwest's commercial

air service. Plaintiffs do not purport to maximize public access to a public airport supported by federal funds. Instead, they overtly declare their purpose to be the suppression of competition in pursuit of a purely economic advantage for the Regional Airport. As the 1968 Bond Ordinance itself states in Section 9.5A thereof:

> "It is acknowledged and understood by the Cities that they, in Love Field, Redbird, GSIA and Meacham Field, own and operate airports which by their nature are potentially competitive with the operation of the Regional Airport . . . Accordingly, the Cities . . . shall take . . . steps . . . to provide for the orderly, efficient and effective phase out [of Certificated Air Carrier Services at the above named airports]."

This must be contrasted with the *Port Authority* case, where the justification for the restrictive action taken was a severe shortage of airport capacity, a situation which will not exist in the Dallas/Fort Worth Region in the foreseeable future and which makes mandatory a choice between different classes of rights.

It is readily apparent from the face of the 1968 Ordinance that the Cities' only reason for barring Southwest Airlines from Love Field is to avoid the potential competitive effect on the Regional Airport (*i. e.*, the CAB carriers serving it), regardless of the public's interest in the continuance of convenient and economical short haul commuter air service. This attempted justification is directly contrary to the policy underlying the federal prohibition of the grant of an exclusive right at airports upon which federal funds have been expended. As then U.S. Attorney General Robert H. Jackson declared:

"Legislative history shows that the purpose of the provision is to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics in accordance with the policy of the Act * * * The grant of an exclusive right to use an airport for a particular aeronautical activity, such as an air carrier, falls within Section 303 proscribing any exclusive right for use of any landing area."

On the facts herein, the Court must conclude that a prima facie case of "unjust discrimination" and of the illegal grant of an "exclusive right" has been established and that Plaintiffs' purported justifications therefor are inadequate.[7]

[14] First, with respect to justification, Plaintiffs herein may not claim, as Defendant did in the *Port Authority* case, that the exclusion of Southwest from Love Field serves the "public interest." The TAC, which is charged by statute with determining the public convenience and necessity in the area of intrastate air transportation, has granted Southwest a certificate

[7] A prima facie case of unjust descrimination may be said to exist where, in the terms of the grant agreements, the Sponsor fails to "keep the Airport open to all types, kinds, and classes of aeronautical use without discrimination between such types, kinds, and classes . . ."

This interpretation of a prima facie case of unjust discrimmination is consistent with the interpretation Courts have given that term under Sec. 1374(b) in passenger cases. In those decisions, the Courts have held that a preference for one passenger over another makes out a prima facie case of "unjust discrimination" sufficient to impose the burden of justification on the air carrier. See Archibald v. Pan American Airways, Inc., 460 F.2d 14, 16 (9th Cir. 1972). *Cf.* Wills v. Trans World Airlines, Inc., 200 F.Supp. 360 (S.D.Cal.1961).

empowereing it to serve "any" airport of its choice in the Dallas/Fort Worth area and, through Minute Order No. 22, has prohibited Southwest from discontinuing service to Love Field. The Commission's judgment in these matters is not subject to challenge before this Court. Although Plaintiffs appeared before the CAB with respect to the amendment of the certificates of the interstate air carriers so as to designate single airport service, they have not attempted to secure similar action by the TAC concerning Southwest. The TAC's existing determination that the public interest requires Southwest to serve Love Field must therefore be deemed conclusive and not subject to collateral attack in this action. See Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co. 418 F.2d 387, 398-399 (5th Cir. 1969), cert. denied, 397 U.S. 910, 90 S.Ct. 907, 25 L.Ed.2d 90 (1970); Thompson et al. v. Texas Mexican Ry. Co., 328 U.S. 134, 66 S.Ct. 937, 90 L.Ed. 1132 (1946).

[15] Secondly, Plaintiffs' purely economic justification for excluding Southwest Airlines from Love Field must yield to the recognized preference for commercial air traffic and to the TAC's determination of where the public interest lies in the area of intrastate air transportation.

Thirdly, Plaintiffs' unsystematic classification discriminates not only between different types and kinds of aeronautical use, but also between uses within the same general class as well. Such discrimination is particularly objectionable because of the anti-competitive effects it

has on the airlines and the public they serve.[8] Plaintiffs have broken up the class of commercial passenger service into several subclasses with no consistent rationale thoughout. Charter flights, which may use larger or smaller aircraft than Southwest Airlines, may remain at Love Field, while Southwest Airlines must go. Air taxis, which hold certificates of public convenience and necessity from the TAC, may stay at Love Field although they operate a short-haul passenger service according to published flight schedules. However, Southwest Airlines, which holds the same kind of certificate from the TAC and also operates a short-haul passenger service according to published flight schedules, must go.[9]

[8]The uncontroverted evidence shows that Southwest's presence in the short-haul market, and particularly at close-in Hobby Airport in Houston, has generated vigorous competition among the various carriers on the routes which Southwest serves, resulting in a greatly expanded short-haul commuter market and in very substantial savings to the traveling public.

[9]This distinction between air taxis and Southwest Airlines is even less defensible when one considers that the air taxis carry interline passengers, destined out of state, who must connect with CAB carriers to complete their journeys, while Southwest is prohibited by law from carrying interstate connecting passengers. This difference in carrier authority would militate strongly in favor of removing the air taxis to the Regional Airport so that they will be near the CAB carriers. *cf.*, Aircraft Owners and Pilots Association v. Port Authority, *supra*, 305 F.Supp. at 107, and allowing Southwest to remain at Love Field, rather than the reverse.

The only other difference between Southwest Airlines and the air taxis is the size of the aircraft each uses. Even this has been blurred, however, as the result of a recent (September, 1972) change in the CAB regulations which permits air taxi operators to utilize aircraft with a maximum capacity of 30 passengers and

Most egregious of all is the distinction the 1968 Ordinance makes between the carriage of intrastate passengers by Southwest Airlines and the carriage of such passengers by its CAB certificated competitors. As discussed above, this is a per se discrimination clearly violative of the federal statutes.

Finally, the attempt to exclude Southwest Airlines from Love Field is particularly irrational and inherently "unjust" because it removes to a more remote airport the one kind of passenger service which has most need of a close-in airport. It is virtually undisputed that short-haul air service of the type involved in Southwest's only markets is far more vulnerable to competition from private automobiles, buses, and trains than long haul air service. As a result, the increased passenger ground transportation time and expense resulting from using an inconvenient airport is more likely to discourage a short-haul, intrastate commuting passenger from using the airways than a long haul interstate passenger, in whose case the time and expense of going to and from an airport constitutes only a relatively small part of his total trip time and expense. Considerable evidence presented at the trial showed that travel time and expense to the Regional Airport will be significantly greater for the vast majority of air travelers in the Dallas-Fort Worth area than travel time and expense to Love Field and that an overwhelming majority of Southwest's passengers preferred Love

a maximum payload (passengers, baggage, and freight) of 7,500 pounds. Thus, for the first time, these carriers can effectively compete with Southwest Airlines, especially if Southwest is forced to operate from the distant Regional Airport, while the air taxis use Love Field.

Field. It also showed that none of the Plaintiffs had studied this problem or surveyed passenger preferences and that elsewhere in the country, where dual airport services existed, the short-haul commuter carriers were authorized to serve the close-in airport while long haul service was provided through the outlying airport. Consequently, this Court concludes that excluding Southwest's strictly short haul service from Love Field, while allowing long haul flights by charter carriers, corporate jets, and others to remain there, is unjustly discriminatory within the meaning of the federal statutes, and improperly grants an exclusive right to the aircraft users who will be eligible to use Love Field after the Regional Airport opens. See 40 Op.A.G. 71 (June 4, 1941).[10]

[16] Wholly apart from the federal grounds set forth above, the exclusion of Southwest from Love Field is prohibited by state law.

The City of Dallas, owner and operator of Love Field, is a creation of the State of Texas, and, under the Texas Constitution, may only enact ordinances and charter provisions which do not:

> "... contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State: ...."

[10]In addition to the federal statutes discussed above, Defendant has argued that its proposed exclusion from Love Field violates 49 U.S.C. Sec. 1374(b); the equal protection clause of the United States Constitution, its right to travel, and its right of access to the navigable airspace of the United States. Defendant has also argued that the Dallas Ordinance discriminates against its passengers on the basis of wealth. The Court finds no need to reach and decide these points due to the disposition of Defendant's claims on other grounds.

Texas Constitution, Art. 11, Sec. 5, Vernon's Ann.St.[11]

Additionally, the State has expressly granted the city certain powers to regulate airports pursuant to the Municipal Airports Act, Art. 46d–1 through 46d–22, V.A.C.S. This power to regulate airports is, however, specifically circumscribed by the same Municipal Airports Act:

> "(b) Conformity to Federal and State law. No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States *or laws of this State, or to any regulations promulgated or standards established pursuant thereto.*" (emphasis added) Art. 46d–7(b) V.A.C.S.

The Texas Aeronautics Commission has intervened in this matter and adopted the contentions of Southwest Airlines. It most specifically urges that the Plaintiffs' attempted exclusion of Southwest from Love Field is illegal as being, first, beyond the power of the Plaintiffs, and, second, in direct conflict with regulations promulgated pursuant to the laws of the State of Texas.

The Texas Aeronautics Act, Art. 46c–1 et seq., V.A.C.S., delegates to the TAC the unqualified authority to regulate scheduled intrastate carriers and directs it to consider "the encouragement and develop-

[11]See also, Art. 1165, V.A.C.S., relating to Home Rule Cities, which provides in pertinent part: "No charter or any ordinances passed under said charter shall contain any provision inconsistent with the Constitution or general laws of this state."

ment of an intrastate air transportation system properly adapted to the present and future needs of the State of Texas." Art. 46c–6, Subd. 3(b), V.A.C.S. In conducting its regulatory activities, the TAC is charged with determining, and providing for, the public convenience and necessity of the citizens of the *entire State* with respect to routes, fares, schedules, and all other relevant aspects of intrastate air service or proposed air service. Plaintiff Cities neither conducted polls nor made investigations or held hearings of any kind to determine *public* convenience and necessity insofar as the Dallas/Houston, Dallas/San Antonio flights of Southwest are concerned, and it might be pointed out that such investigation would involve air travelers of Houston and San Antonio as well as those of Dallas. Indeed, the governing bodies of the Cities would have neither the time nor the expertise to hold hearings and make such determination. Beyond any question, the TAC is the sole authority for the purpose of determining the public interest and needs with respect to Texas intrastate air service. Texas Aeronautics Commission v. Braniff Airways, Inc., 454 S.W.2d 199 at 201 (Tex.Sup.1970).

[17, 18] Any effort by Plaintiffs to regulate the service of a TAC carrier (*e.g.*, Southwest Airlines) impinges upon the jurisdiction of the TAC and is therefore invalid under Art. 11, Sec. 5 of the Texas Constitution, Art. 1165, V.A.C.S. and Art. 46d–7(b), V.A.C.S.[12] Moreover, the conflict between state and

[12]Defendants point out that the regulation of intrastate carriers under the guise of regulating airports could have a very substantial effect upon aeronautical activity in the State as a whole; *e.g.*, should Dallas be permitted to refuse Southwest Airlines access to Love Field, the effect would be felt not only

municipality in the instant case is even more direct. The TAC granted Southwest a Certificate of Public Convenience and Necessity to serve Dallas, Texas, through "any" airport in the area. Subsequently, the

---

by the citizens of Dallas, but also by the citizens of Houston and San Antonio. They further point out that there are approximately 200 municipal airports in the State of Texas and that, if each municipality were permitted to limit the use of its airport as it wishes, then there would, in effect, be 200 regulatory bodies empowered to determine "the present and future needs of the State of Texas." No intrastate air transportation system could possibly be developed under such chaotic regulatory conditions, and the rationale for a single state agency to regulate all aspects of intrastate air service is obvious.

Additionally, Southwest's type of air service is unique to the State of Texas and was inaugurated only after three and one-half years of litigation involving questions of public convenience and necessity, among others. Southwest's President testified that the Company would not be in existence today had it continued to serve Houston's outlying Intercontinental Airport rather than Houston's close-in Hobby Airport. It would ill-suit the public convenience and necessity of the citizens of the State if Dallas were permitted to force Southwest to the Regional Airport, thereby causing the demise of a Company which offered convincing evidence at the trial that it has provided superior commuter air service at lower fares. The Court makes no findings of fact on this issue, which is discussed simply in order to illustrate why the TAC, which has experience and expertise in such matters, should make the final determination concerning them. See Thompson et al. v. Texas Mexican Ry. Co., 328 U.S. 134, 66 S.Ct. 937, 90 L.Ed. 1132 (1946) and the September 2, 1969 Opinion of the Texas Attorney General wherein he states that the Texas Aeronautics Act "subordinates, so far as for-hire air transportation is concerned, the general power of cities to regulate commerce within their boundaries." See also City of Dallas et al. v. CAB, 944 U.S.App.D.C. 175, 221 F.2d 501 (1954), cert. denied 348 U.S. 914, 75 S.Ct. 295, 99 L.Ed. 717.

TAC ordered Southwest not to discontinue service to any airport then being served, without the prior approval of the TAC. TAC Minute Order No. 22, November 12, 1971. On November 12, 1971, Southwest was serving Love Field. The granting of the Certificate and the promulgation of Minute Order No. 22 establish the determination of the TAC that the public's convenience and necessity require that Southwest continue serving Dallas through Love Field. Plaintiffs' attempt to ignore the actions and jurisdiction of the TAC, by requiring Southwest to cease providing service through Love Field, is in direct conflict with such actions and jurisdiction and, therefore, beyond Plaintiffs' powers. There is abundant authority establishing that in conflicts between municipalities and regulatory agencies, both creations of the State of Texas, the regulatory agency must prevail. City of Arlington v. Lillard, 116 Tex. 446, 294 S.W. 829 (1927); City of Fort Worth v. Lillard, 116 Tex. 509, 294 S.W. 831 (1927).

[19] For the foregoing reasons, the Court concludes: (1) That determinations of public convenience and necessity respecting intrastate air commerce are exclusively within the jurisdiction of the TAC; (2) that exclusion of Southwest Airlines from Love Field constitutes an impermissible assumption by Plaintiffs of the power to amend Southwest Airlines' certificate of public convenience and necessity, contrary to the exclusive powers over such certificates conferred upon the Texas Aeronautics Commission by the Texas Aeronautics Act; and (3) that Section 9.5 of the 1968 Regional Airport Concurrent Bond Ordinance and the ordinances supplemental thereto are in conflict with,

and must yield to, the TAC's Minute Order No. 22, insofar as these Ordinances purport to authorize the exclusion of Southwest Airlines from Love Field.

[20] Finally, the Plaintiffs are prohibited from excluding Southwest Airlines from Love Field by prior legal commitments and covenants entered into by the City of Dallas. The City has issued several series of Airport Revenue Bonds for the purpose of financing construction at Love Field. In at least three of these series (364, 401, and 409), some $8.9 million of which are presently outstanding and unpaid, the City covenanted with the bondholders (including Southwest Airlines) as follows:

> "That while any of the Revenue Bonds or interest thereon are outstanding and unpaid, the City will continue to operate and maintain or cause to be operated and maintained the Airport [Love Field] as an airport for the accommodation of *scheduled airlines* serving the City . . ." (emphasis added)

In addition to the Love Field Airport Revenue Bonds, Dallas has sold several series (363, 379, 371, and 390) of Love Field Maintenance Base Bonds, of which approximately $25 million are outstanding and unpaid and in which it covenanted with the bondholders as follows:

> "The City will continuously operate its Airport at Love Field, and will not cause or suffer curtailment of the *general* use thereof so long as any of the Revenue Bonds or any interest thereon remains outstanding and unpaid." (emphasis added)

The exclusion of Southwest Airlines from Love Field would breach each of these covenants. The fact that circumstances may have changed and that Dallas would now like to ignore its prior covenants does not provide

an adequate basis for the City's proposed action. Such obligations are binding and the City must adhere to them. City of Houston v. Mann, 139 Tex. 640, 164 S.W.2d 548 (1942).

The Plaintiffs assert that the covenants in the Love Field Airport Revenue Bonds are satisfied by making these three series of bonds senior to the Dallas/Fort Worth Regional Airport Bonds with respect to Regional Airport revenues. It is quite clear from the language of these covenants, however, that such an interpretation has no merit. Furthermore, even if such interpretation were meritorious, the City's proposed actions would still be precluded by the covenants in the four series of Love Field Maintenance Base Bonds.

In reaching its decision, the Court finds it unnecessary to invalidate Section 9.5 of the 1968 Regional Airport Concurrent Bond Ordinance, since that Ordinance authorizes Plaintiffs to phase out Certificated Air Carrier Services only to the extent that such action is "legally permissible" and not in violation of "presently outstanding legal commitments or covenants prohibiting such action." Since the Court has found that the exclusion of Southwest Airlines from Love Field would not be legally permissible, in part because it would violate presently outstanding legal commitments or covenants, the phase-out provision of the Ordinance is declared not applicable to Southwest Airlines.

As the Court is confident that Plaintiffs will abide by its ruling in this case and not attempt to interfere with or burden Southwest's right to use Love Field, an injunction to enforce its decree is deemed unnecessary.

It is accordingly ordered and declared that Plaintiffs herein may not lawfully exclude Defendant, Southwest Airlines Co., from the use of Love Field, Dallas, Texas, and its airport facilities so long as Love Field remains open as an airport.

APPENDIX C

Order No. E-21341

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 30th day of September, 1964

DALLAS-FORT WORTH REGIONAL AIRPORT INVESTIGATION Docket 13959

ORDER

There has been submitted to the Board for decision in the above-entitled proceeding, the question whether the public convenience and necessity require the alteration, amendment, or modification of the certificates of the air carriers authorized to serve Dallas and Fort Worth, Texas, so as to require that Dallas and Fort Worth be served through a single airport. While we have not yet completed our deliberations in this case, the Board is now of the unanimous opinion that service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present and future requirements for transcontinental cargo and passenger services.

Before proceeding to the entry of a formal decision in this case, the Board believes that it is in the public interest to afford the interested communities a final opportunity to arrive at a voluntary solution as to the

location of the airport to be designated and the steps that should be taken to achieve this result at a reasonable time in the future. We have faith and confidence that the cities of Dallas and Fort Worth can arrive at a fair and equitable solution of this problem and we therefore have decided to give the communities a period of 180 days within which to arrive at a voluntary agreement concerning the location of the airport to be used for the consolidated service and to submit such agreement to the Board. Although we are convinced that the determination of the airport through which the service shall ultimately be provided should be made without delay, we are aware of the practical difficulties involved in the transition to service through a single airport, and contemplate a voluntary arrangement for an orderly transfer that will be finally effected no later than sometime in 1968. Should the parties, contrary to our expectation, be unable to agree to designation of the airport to serve the area, the Board will then proceed promptly to issue a decision.

ACCORDINGLY, IT IS ORDERED That the City and Chamber of Commerce of Dallas and the City and Chamber of Commerce of Fort Worth be and they hereby are permitted 180 days from the date of this order within which to submit a voluntary agreement as to the airport to be designated as the single airport to serve the two cities, such agreement to include the plans and programs for implementing the agreement.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

APPENDIX D

VERNON'S ANNOTATED TEXAS STATUTES

MUNICIPAL AIRPORTS ACT

Gross References

Airport authorities, see Const. art. 9, § 12.

Airstrips, use of county equipment, machinery and employees of counties of 17,650 to 17,700 for construction and maintenance, see art. 1581d—J.

Leases by commissioners courts, see art. 2351.

Law Review Commentaries

Venue of suit for removal of airport hazard governed by injunction statute. 36 Texas L.Rev. 538 (1958).

Library References

Aviation Key 217.
C.J.S. Aerial Navigation § 19.

Forms with practice commentaries, see Stayton Texas Forms, § 1637 et seq.

Art. 46d—1. Definitions

As used in this Act, unless the text otherwise requires:

(a) "Airport" means any area of land or water which is used, or intended for use, for the landing and take-off of aircraft, and any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or right-of-ways, together with all airport buildings and facilities located thereon.

(b) "Air navigation facility" means any facility—other than one owned and operated by the United States—used in, available for use in, or designed for use in, aid of air navigation, including any structures, mechanism, lights, beacons, markers, communicating systems, or other instrumentalities, or devices used or useful as an aid, or constituting an advantage or convenience, to the safe taking-off, navigation, and landing of aircraft, or the safe and efficient operation or maintenance of an airport, and any combination of any or all of such facilities.

(c) "Airport hazard" means any structure, object of natural growth, or use of land which obstructs the airspace required for the flight of aircraft in landing or taking-off at an

airport or is otherwise hazardous to such landing or taking-off of aircraft.

(d) "Municipality" means any county, or any incorporated city, village or town of this State. "Municipal" means pertaining to a municipality as herein defined.

(e) "Person" means any individual, firm, partnership, corporation, company, association, joint stock association, or body politic; and includes any trustee, receiver, assignee or other similar representative thereof.

Acts 1947, 50th Leg., p. 184, ch. 114, §1.

Art. 46d—2. General powers of municipalities in the establishment, acquisition, operation and maintenance of airports and air navigation facilities.

(a) Establishment, Operation, Land Acquisition. Every municipality is authorized, out of any appropriations or other moneys made available for such purposes, to plan, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police airports and air navigation facilities, either within or without the territorial limits of such municipality and within or without the territorial boundaries of this State, including the construction, installation, equipment, maintenance and operation at such airports of buildings and other facilities for the servicing of aircraft or for the comfort and accommodation of air travelers, and the purchase and sale of supplies, goods and commodities as an incident to the operation of its airport properties. For such purposes the municipality may use any available property that it may now or hereafter own or control and may, by purchase, gift, devise, lease, eminent domain proceedings or otherwise, acquire property, real or personal, or any interest therein including easements in airport hazards or land outside the boundaries of an airport or airport site, as are necessary to permit safe and efficient operation of the airport or to permit the removal, elimination, obstruction—marking of obstruction—lighting of airport hazards or to prevent the establishment of airport hazards.

(b) Acquisition of Existing Airports. The municipality may by purchase, gift, devise, lease, proceedings or otherwise, acquire existing airports and air navigation facilities, provided however it shall not acquire or take over any airport or air navigation facility owned or controlled by another municipality or public agency of this or any other State without the consent of such municipality or public agency.

(c) Establishment of Airports on Public Waters and Reclaimed Lands. For the purposes of this Act, a municipality may establish or acquire and maintain, within or bordering upon the territorial limits of the municipality, airports in, over and upon, any public waters of this State, any submerged lands under such public waters, and any artificial or reclaimed lands which before the artificial making or reclamation thereof constituted a portion of the submerged lands under such public waters; and may construct and maintain terminal buildings, landing floats, causeways, roadways and bridges for approaches to or connecting with any such airport, and landing floats and breakwaters for the protection thereof.

(d) Limitation on Design and Operation of Air Navigation Facilities. All air navigation facilities established or operated by municipalities shall be supplementary to and coordinated in design and operation with those established and operated by the Federal and State governments.

Acts 1947, 50th Leg., p. 184, ch. 114, § 2.

Art. 46d—3. Disposal of airport property.

Except as may be limited by the terms and conditions of any grant, loan, or agreement pursuant to Section 12 of this Act, every municipality may by sale, lease or otherwise, dispose of any airport, air navigation facility or other property, or portion thereof or interest therein, acquired pursuant to this Act. Such disposal by sale, lease or otherwise, shall be in accordance with the laws of this State, or provisions of the charter of the municipality, governing the disposition of other property of the municipality, except that in the case of disposal to another municipality or agency of the State or

Federal government for aeronautical purposes incident thereto, the sale, lease, or other disposal may be effected in such manner and upon such terms as the governing body of the municipality may deem in the best interest of the municipality.

Acts 1947, 50th Leg., p. 185, ch. 114, § 3.

Art. 46d—4. Operation and use privileges.

(a) Under Municipal Operation. In operating an airport or air navigation facility owned, leased or controlled by a municipality, such municipality may, except as may be limited by the terms and conditions of any grant, loan, or agreement pursuant to Section 12 of this Act, enter into contracts, leases and other arrangements for a term not exceeding forty (40) years with any persons:

(1) granting the privilege of using or improving such airport or air navigation facility or any portion or facility thereof, or space therein for commercial purposes;

(2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport or air navigation facility; or

(3) making available services to be furnished by the municipality or its agents at such airport or air navigation facility.

In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services, which shall be reasonable and uniform for the same class of privilege or service and shall be established with due regard to the property and improvements used and the expenses of operation to the municipality.

(b) Under Other Operation. Except as may be limited by the terms and conditions of any grant, loan, or agreement pursuant to Section 12 of this Act, a municipality may by contract, lease or other arrangement, upon a consideration fixed by it, grant to any qualified person for a term not to exceed forty (40) years the privilege of operating, as agent of the municipality or otherwise, any airport owned or controlled by the municipality; provided that no such person shall

be granted any authority to operate the airport other than a public airport or to enter into any contracts, leases or other agreements in connection with the operation of the airport which the municipality might not have undertaken under Subsection (a) of this Section.

Acts 1947, 50th Leg., p. 185, ch. 114, § 4.

Art. 46d—5. Liens.

To enforce the payment of any charges for repairs or improvements to or storage or care of, any personal property made or furnished by the municipality or its agents in connection with the operation of an airport or air navigation facility owned or operated by the municipality, the municipality shall have liens on such property, which shall be enforceable by the municipality as provided by law.

Acts 1947, 50th Leg., p. 186, ch. 114, § 5.

Art. 46d—6. Delegation of authority to airport officer or board.

Any authority vested by this Act in a municipality or in the governing body thereof, for the planning, establishment, development, construction, enlargement, improvement, maintenance, equipment, operation, regulation, protection and policing of airports or other air navigation facilities established, owned or controlled, or to be established, owned or controlled by the municipality may be vested by resolution of the governing body of the municipality in an officer or board or other municipal agency whose powers and duties shall be prescribed in the resolution; provided however, that the expense of such planning, establishment, development, construction, enlargement, improvement, maintenance, equipment, operation, regulation, protection and policing shall be a responsibility of the municipality.

Acs 1947, 50th Leg., p. 186, ch. 114, § 6.

Art. 46d—7. Reguiations and jurisdiction

(a) Scope. A municipality, which has established or acquired or which may hereafter establish or acquire an airport or

air navigation facility, is authorized to adopt, amend and repeal such reasonable ordinances, resolutions, rules, regulations and orders as it shall deem necessary for the management, government and use of such airport or air navigation facility under its control, whether situated within or without the territorial limits of the municipality. For the enforcement thereof, the municipality, may, by ordinance or resolution, as may by law be appropriate, appoint airport guards or police, with full police powers, and fix penalties, within the limits prescribed by law, for the violation of the aforesaid ordinances, resolutions, rules, regulations and orders. Said penalties shall be enforced in the same manner in which penalties prescribed by other ordinances, or resolutions of the municipality are enforced. To the extent that an airport or other air navigation facility controlled and operated by a municipality is located outside the territorial limits of the municipality, it shall subject to Federal and State laws, rules and regulations, be under the jurisdiction and control of the municipality controlling or operating it, and no other municipality shall have any authority to charge or exact a license fee or occupation tax for operations thereon.

(b) Conformity to Federal and State Law. No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, or to any regulations promulgated or standards established pursuant thereto. Acts 1947, 50th Leg., p. 186, ch. 114, § 7.

Art. 46d—8. Taxation.

In addition to and exclusive of any taxes which may be levied for the interest and sinking fund of any bonds, notes or time warrants issued under authority of this Act, or any other Act of the Legislature authorizing municipalities to issue such bonds, notes or warrants for airport purposes, the governing body of any municipality may and is hereby empowered to levy and collect a special tax not to exceed for any one year five cents (5c) on each One Hundred Dollars ($100) for the purpose of improving, operating, maintaining and

conducting an airport or air navigation facility, or for any other purpose falling within the purview of this Act; provided, however, that nothing in this Act shall be construed as authorizing any municipality to exceed the limits of indebtedness placed upon it under the Constitution.

Acts 1947, 50th Leg., p. 186, ch. 114, § 8.

Art. 46d—9. Bond issues—financing acquisition costs and improvements.

The cost of planning and acquiring, establishing, developing, constructing, enlarging, improving, or equipping, an airport or air navigation facility, or the site therefor, including buildings and other facilities incidental to the operation thereof, and the acquisition or elimination of airport hazards, may be paid for wholly or partly from the proceeds of the sale of bonds of the municipality, as the governing body of the municipality shall determine. For such purposes a municipality may issue general or special obligation bonds, revenue bonds or other forms of bonds, secured or unsecured, including refunding bonds, and levy taxes to provide for the interest and sinking funds of any bonds so issued, the authority hereby given for the issuance of such bonds and levy and collection of such taxes to be exercised in accordance with the provisions of Title 22 of the Revised Civil Statutes of Texas, 1925, Article 701 et seq., and Acts amendatory thereof or supplementary thereto. All bonds issued by a municipality pursuant to this Act which are payable, as to principal and interest, solely from the revenues of an airport or air navigation facility shall so state on their face. In any suit, action or proceeding involving the security, or the validity or enforceability, of any bonds issued by a municipality, which bonds state on their face that they were issued pursuant to the provisions of this Act and for a purpose or purposes authorized to be accomplished by this Act, such bonds shall be conclusively deemed to have been issued pursuant to this Act for such purpose or purposes.

Acts 1947, 50th Leg., p. 187, ch. 114, § 9.

Art. 46d—10. Validation of prior acquisitions, actions and bond issues.

Any acquisition of property heretofore made, within or without the limits of any municipality of the State, for the purposes authorized by this Act, and any other action heretofore taken by a municipality in the furtherance of such purposes, including but not limited to the making of appropriations, the expenditure of money, the incurring of debts, the acceptance and disbursement of Federal, State or other grants or loans, the issuance of payment and bonds, the execution of leases and contracts, which acquisition or action would have been authorized had this Act been in effect at the time of such acquisition or action, is hereby ratified and made valid. All bonds heretofore issued in furtherance of purposes authorized by this Act and actions ratified by this Section are confirmed as legal obligations of the municipality, and, without prejudice to the general powers granted to the municipality by this Act, such municipality is hereby authorized to issue further bonds for such purposes up to the limit fixed in the original authorization therefor, which bonds shall be legal obligations in accordance with their terms.

Acts 1947, 50th Leg., p. 187, ch. 114, § 10.

Art. 46d—11. Application of airport revenues and sale proceeds.

The revenues obtained by a municipality from the ownership, control or operation of any airport or air navigation facility, including proceeds from the sale of any airport or portion thereof or air navigation facility property, shall be deposited in a special fund to be designated the " Airport Fund," which revenues shall be appropriated solely to, and used by the municipality for, the purposes authorized by this Act.

Acts 1947, 50th Leg., p. 187, ch. 114, § 11.

Art. 46d—12. Federal and state-aid.

(a) Acceptance Authorized, Conditions. Every municipality is authorized to accept, receive, receipt for, disburse and

expand Federal and State moneys and other moneys, public or private, made available by grant or loan or both to accomplish, in whole or in part, any of the purposes of this Act. All Federal moneys accepted under this Section shall be accepted and expended by the municipality upon such terms and conditions as are prescribed by the United States and as are consistent with State law; and all State moneys accepted under this Section shall be accepted and expended by the municipality upon such terms and conditions as are prescribed by the State. Unless otherwise prescribed by the agency from which such moneys were received, the chief financial officer of the municipality shall, on its behalf deposit all moneys received pursuant to this Section and shall keep them, in separate funds designated according to the purposes for which the moneys were made available, in trust for such purposes.

(b) Aeronautics Commission as Agent. A municipality is authorized to designate the Texas Aeronautics Commission as its agent to accept, receive, receipt for and disburse Federal and State moneys, and other moneys, public or private, made available by grant or loan or both to accomplish, in whole or in part, any of the purposes of this Act; and to designate the said Commission as its agent in contracting for and supervising the planning, acquisition, development, construction, improvement, maintenance, equipment or operation of any airport or other air navigation facility. All contracts made, let or awarded by the Texas Aeronautics Commission acting as agent of a municipality under authority of this Section, shall be made, let or awarded pursuant to the laws governing the making of contracts by or on behalf of the State. Such municipality may enter into an agreement with the said Aeronautics Commission prescribing the terms and conditions of the agency in accordance with such terms and conditions as are prescribed by the United States, if Federal money is involved, and in accordance with the applicable laws of this State. All Federal moneys accepted under this Section by the Texas Aeronautics Commission shall be accepted and transferred or expended by said Commission upon such terms and conditions as are prescribed by the United

States. All moneys received by the Texas Aeronautics Commission pursuant to this Subsection shall be deposited in the State Treasury, and unless otherwise prescribed by the agency from which such moneys were received, shall be kept in separate funds designated according to the purposes for which the moneys were made available, and held by the State in trust for such purposes.

Acts 1947, 50th Leg., p. 183, ch. 114, § 12.

Art. 46d—13. Contracts.

A municipality may enter into any contracts necessary to the execution of the powers granted it, and for the purposes provided by this Act.

Acts 1947, 50th Leg., p. 188 ch. 114, § 13.

Art. 46d—14. Joint operations.

(a) Authorization. For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality, as defined in this Act, any agency of the State government and of the United States, and any municipality, political subdivision and agency of another State: and the term "governing body" means the governing body of a county or municipality, and the head of the agency if the public agency is other than a county or municipality. All powers, privileges and authority granted to any municipality by this Act may be exercised and enjoyed jointly with any public agency of any other State or of the United States to the extent that the laws of such other State or of the United States permit such joint exercise or enjoyment. If not otherwise authorized by law, any agency of the State government when acting jointly with any municipality, may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a municipality.

(b) Agreement. Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two (2) or more municipalities are specially authorized to make such

agreement or agreements as they may deem necessary for the joint acquisition and operation of airports and air navigation facilities. Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. Each such agreement shall specify its duration, the proportionate interest which each public agency shall have in the property, facilities and privileges involved, the proportion to be borne by each public agency of preliminary costs and costs of acquisition, establishment, construction, enlargement, improvement, and equipment of the airport or air navigation facility, the proportion of the expenses of maintenance, operation, regulation and protection thereof to be borne by each and such other terms as are required by the provisions of this Section. The agreement may also provide for: amendments thereof, and conditions and methods of termination of the agreement; the disposal of all or any of the property, facilities and privileges jointly owned, prior to or upon said property, facilities and privileges, or any part thereof, ceasing to be used for the purposes provided in this Act, or upon termination of the agreement; the distribution of the proceeds received upon any such disposal, and of any funds or other property jointly owned and undisposed of; the assumption or payment of any indebtedness arising from the joint venture which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.

(c) Joint Board. Public agencies acting jointly pursuant to this Section shall create a joint board which shall consist of members appointed by the governing body of each participating public agency. The number to be appointed, their term and compensation, if any, shall be provided for in the joint agreement. Each such joint board shall organize, select officers for terms to be fixed by the agreement, and adopt and amend from time to time rules for its own procedure. The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport or air navigation facility or airport hazard to be jointly acquired, controlled

and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport, air navigation facility or airport hazard, subject to the limitations of Subsection (d) of this Section.

(d) Limitations on Joint Board.

(1) Expenditures. The total expenditures to be made by the joint board for any purpose in any calendar year shall be determined by a budget approved by the governing bodies of its constituent public agencies on or before the preceding December 1st.

(2) Acquisitions Beyond Sums Allotted. No airport, air navigation facility, airport hazard, or real or personal property, the cost of which is in excess of sums therefor fixed by the joint agreement or allotted in the annual budget, may be acquired by the joint board without the approval of the governing bodies of its constituent public agencies.

(3) Eminent Domain. Eminent domain proceedings under this Section may be instituted only by authority of the governing bodies of the constituent public agencies of the joint board. If so authorized, such proceedings shall be instituted in the names of the constituent public agencies jointly, and the property so acquired shall be held by said public agencies as tenants in common until conveyed by them to the joint board.

(4) Disposal of Real Property. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the governing bodies of its constituent public agencies, provided that the joint board may, without such consent, enter into the contract, lease or other arrangements contemplated by Section 4 of this Act.

(5) Police Regulations. Any resolutions, rules, regulations or orders of the joint board dealing with subjects authorized by Section 7 of this Act shall become effective only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations or orders of the joint board shall

have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations or orders of each public agency would have in its own territory or jurisdiction.

(e) Joint Fund. For the purpose of providing a joint board with moneys for the necessary expenditures in carrying out the provisions of this Section, a joint fund shall be created and maintained, into which shall be deposited the share of each of the constituent public agencies as provided by the joint agreement. Each of the constituent public agencies shall provide its share of the fund from sources available to each. Any Federal, State or other contributions or loans, and the revenues obtained from the joint ownership, control and operation of any airport or air navigation facility under the jurisdiction of the joint board shall be paid into the joint fund. Disbursements from such fund shall be made by order of the board, subject to the limitations prescribed in Subsection (d) of this Section.

Acts 1947, 50th Leg., p. 188, ch. 114, § 14.

Art. 46d—15. Public purpose, county and municipal purpose. The acquisition of any land or interest therein pursuant to this Act, the planning, acquisition, establishment, development, construction, improvement, maintenance, equipment, operation, regulation, protection and policing of airports and air navigation facilities, including the acquisition or elimination of airport hazards, and the exercise of any other powers herein granted to municipalities and other public agencies, to be severally or jointly exercised, are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity; and in the case of any county, are declared to be county functions and purposes as well as public and governmental; and in the case of any municipality other than a county, are declared to be municipal functions and purposes as well as public and governmental. All land and other property and privileges acquired and used by or on behalf of any municipality or other public agency in the manner and for the purposes enumerated in this Act shall and are hereby declared to be acquired and

used for public and governmental purposes and as a matter of public necessity, and, in the case of a county or municipality, for county or municipal purposes, respectively.

Acts 1947, 50th Leg., p. 190, ch. 114, § 15.

Art. 46d—16. Airport property and income exempt from taxation.

Any property in this State acquired by a municipality for airport purposes pursuant to the provisions of this Act, and any income derived by such municipality from the ownership, operation or control thereof, shall be exempt from taxation to the same extent as other property used for public purposes. Any municipality is authorized to exempt from municipal taxation any property, acquired within its boundaries by a public agency of another State for airport purposes, and any income derived from such property, to the extent that such other State authorizes similar exemptions from taxation to municipalities of this State.

Acts 1947, 50th Leg., p. 190, ch. 114, § 16.

Art. 46d—17. Supplementary authority.

In addition to the general and special powers conferred by this Act, every municipality is authorized to exercise such powers as are necessarily incidental to the exercise of such general and special powers.

Acts 1947, 50th Leg., p. 191, ch. 114, § 17.

Art. 46d—18. Airport zoning.

Nothing contained in this Act shall be construed to limit any right, power or authority of a municipality to regulate airport hazards by zoning.

Acts 1947, 50th Leg., p. 191, ch. 114, § 18.

Art. 46d—19. Interpretation and construction.

This Act shall be so interpreted and construed as to make uniform so far as possible the laws and regulations of this

State and other States and of the government of the United States having to do with the subject of municipal airports.

Acts 1947, 50th Leg., p. 191, ch. 114, § 19.

Art. 46d—20. Severability.

If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Acts 1947, 50th Leg., p. 191, ch. 114, § 20.

Art. 46d—21. Cumulative.

This Act is cumulative of and in addition to all laws of the State of Texas on this subject.

Acts 1947, 50th Leg., p. 191, ch. 114, § 21.

Art. 46d—22. Short title.

This Act may be cited as the "Municipal Airports Act."

Acts 1947, 50th Leg., p. 191, ch. 114, § 22.

APPENDIX E

VERNON'S ANNOTATED TEXAS STATUTES

AERONAUTICS COMMISSION AND DIRECTOR OF AERONAUTICS

Art. 46c—1. Definitions.

When used in this Act, unless expressly stated otherwise:

(a) The term "person" means any individual, firm, partnership, corporation, association, joint stock association or body politic; and includes any trustee, receiver, assignee, agent or authorized representative thereof.

(b) The term "aircraft" means any contrivance now known or hereafter invented which is intended, used or designed for flight in the air.

(c) The term "certificate" means a certificate of public convenience and necessity issued under this Act.

(d) The term "commission" means the Texas Aeronautics Commission.

(e) The term "air carrier" means every person owning, controlling, operating or managing any aircraft as a common carrier in the transportation of persons or property for compensation or hire which conducts all or part of its operation in the State of Texas; providing that the term "air carrier" as used in this Act shall not include, and this Act shall not apply to, air carriers operating within the State of Texas pursuant to the provisions of a certificate of public convenience and necessity issued by the Civil Aeronautics Board under the Federal Aviation Act of 1958, as now or hereafter amended.

(f) The term "aeronautics" means the art and science of flight of aircraft of all types; aviation; the operation, navigation, maintenance, construction of aircraft and all component parts thereof and includes air navigation aids, such as lighting, markings, radio, ground to aircraft, aircraft to ground, aircraft to aircraft, and related communication navigation and piloting and air crew facilities and also includes airports and airstrips and the design, construction, repair or maintenance of all or any part thereof and improvements

thereto and the dissemination of information and instruction pertaining to all of the foregoing.

Amended by Acts 1969, 61st Leg., p. 1394, ch. 424, § 1, eff. Sept. 1, 1969.

Art. 46c—2. Declaration.

It is hereby declared that the purpose of this Act is to further the public interest and aeronautical progress by providing for the protection, promotion, and development of aeronautics; by cooperating in effecting a uniformity of the laws relating to the development of aeronautics in the several states; by revising existing statutes relative to the development and regulation of aeronautics so as to grant to a state agency such powers and impose upon it such duties that the state may properly perform its functions relative to aeronautics and effectively exercise its jurisdiction over persons and property within such jurisdiction, may assist in the promotion of a state-wide system of airports, may cooperate with and assist the political subdivisions of this state in order that those engaged in aeronautics of every character may so engage with the least possible restrictions consistent with the safety and the rights of other person or persons; and by providing for cooperation with the federal authorities in the development of a national system of civil aviation and for coordination of the aeronautical activities of those authorities and the authorities of this state by assisting in accomplishing the purposes of federal legislation and eliminating costly and unnecessary duplication of functions properly in the province of the federal agencies.

Amended by Acts 1969, 61st Leg., p. 1394, ch. 424, § 1, eff. Sept. 1, 1969.

Art. 46c—3. Aeronautics Commission, Organization, Membership

(a) The Texas Aeronautics Commission, created in 1945, shall consist of six Commissioners to be appointed by the Governor and confirmed by the Senate. The terms of the Commissioners shall be for a period of six years. Such terms

shall begin on the first day of an odd numbered year and end on the last day of an even numbered year. The present Commissioners shall continue in office for a term as designated by the Governor at the time of their appointment. The Governor shall appoint successors for the present Commissioners (who may be reappointed) at the expiration of their present terms. Any member appointed to fill a vacancy occurring prior to the expiration of the term to which his predecessor was appointed shall be appointed to only the remainder of such term. Each member shall serve until the appointment and qualification of his successor. Each member shall be reimbursed for actual and necessary expenses incurred by him in the performance of his duties. Each member may be paid the sum of $10 per diem, or part thereof, spent in attending to his duties as Commissioner, but no member shall receive more than the sum of $600 in any one year as per diem.

(b) To qualify for appointment to the Commission by the Governor, an appointee must have the following minimum qualifications in addition to those set out herein:

(1) Bona fide continuous residence in the state for the 10 years immediately previous.

(2) Ten years of successful experience in business, professional or governmental activities.

Amended by Acts 1969, 61st Leg., p. 1394, ch. 424, § 1, eff. Sept. 1, 1969.

Art. 46c—4. Organization, Meetings, Reports.

The Commission shall adopt a seal, and make such rules and regulations for its administration, not inconsistent with this Act, as hereby amended, as in its judgment it may deem advisable or necessary, and may from time to time amend such rules and regulations. It shall elect from among its members a chairman, a vice chairman, and a secretary, to serve for one year and annually thereafter shall elect such officers all to serve until their successors are appointed and qualified. It shall fix the date and place for its regular meetings. Four members shall constitute a quorum, and except

as hereafter provided, no action shall be taken by less than a majority of the Commission members present. Special meetings may be called as provided by its rules and regulations. All regular and special Commission meetings shall be open to the public. Not later than December 1 each year, it shall report in writing to the governor detailed and itemized statements of all revenues and of all expenditures made by or in behalf of the Commission, and shall furnish such other information as it may deem necessary or useful or which may be requested by the Governor. The fiscal year of the Commission shall conform to the fiscal year of the state.

Amended by Acts 1969, 61st Leg., p. 1394, ch. 424, § 1, eff. Sept. 1, 1969.

Art. 46c—5. Office and Expense—Employees

Suitable offices and office equipment shall be provided by the state for the Commission in the City of Austin, and it may maintain temporary offices in any other place in the state that it may designate and may incur the necessary expense for office furniture, stationery, printing, incidental expenses, and other expenses necessary for the enforcement of this Act and the general promotion of aeronautics within the state. Regular meetings shall be held at its offices at Austin, but, whenever the convenience of the public or of the parties may be promoted, or delay or expense may be prevented, it may hold hearings or proceedings at any other place designated by it. The Commission may employ such clerical and other employees and assistants as it may deem necessary for the proper transaction of its business and shall fix their salaries. Provided that the Commission shall not make any obligations or expend any state moneys unless and until an appropriation by the Legislature is made therefor.

Amended by Acts 1969, 61st Leg., p. 1394, ch. 424, § 1, eff. Sept. 1, 1969.

Art. 46c—6. Commission Powers and Duties.

Subdivision 1. General. The Commission, and its Director acting under its authority, is empowered and directed to

encourage, foster, and assist in the development of aeronautics in this state and to encourage, aid, and assist in the establishment of airports and airstrips and air navigational facilities in this state, and, as to lands, or portions thereof, or navigational aids or facilities donated or given to the state, or to the Texas Aeronautics Commission to be held by it in trust for the state, the Texas Aeronautics Commission may control, administer, and have jurisdiction thereover, and may lease the same on the terms hereafter provided. The Commission and its Director may cooperate with and assist the United States, municipalities or other governmental subdivisions of this state, or persons engaged in aeronautics or in the development of aeronautics, and may endeavor to coordinate the aeronautical activities of such others, and, municipalities and governmental subdivisions are authorized to cooperate with the Commission in the development of aeronautics and aeronautical navigational facilities or aids in this state.

Subdivision 2. Authority to Contract. The Commission may enter into contracts which it deems necessary or advisable in conformity with and in the execution of the powers granted it by this Act, as amended. However, except as to moneys received by gift, the Commission shall have no power to enter into any contract or agreement binding on the State of Texas for the payment of any moneys which have not been authorized by appropriation of the Legislature from the general revenues or from the Texas Aeronautics Commission Fund. All contracts entered into by the Commission shall be submitted to the attorney general for the approval as to form. The Commission shall not enter into any contract binding the State of Texas in excess of the power granted in this Act.

Subdivision 3. Air Carriers. (a) The Commission is hereby granted and vested with the right, power and authority to promulgate and administer economic and safety rules and regulations over air carriers. The Commission shall be vested with broad discretion in promulgating such rules and regulations. Without limiting the right, power and authority of the Commission, to the extent necessary to enable it to perform

its functions, it may approve or disapprove the maximum or minimum or maximum and minimum rates, fares and charges of each air carrier, require filing of such reports and other data of air carriers as the Commission may deem necessary, approve or disapprove the schedules of the air carriers, and adopt a program, rules and regulations necessary to effectuate its duties hereunder.

(b) No air carrier shall operate as such, after this Act goes into effect, without having first obtained from the Commission a certificate of public convenience and necessity pursuant to a determination by the Commission that its proposed service is in the interest of public convenience and necessity; provided, however, that all operating rights and privileges granted to any air carrier by the Commission prior to the passage of this Act shall continue in effect, authorizing the same service under the same terms and conditions as previously granted by the Commission. Upon notice and hearing, certificates of public convenience and necessity shall be subject to revocation or suspension for violation of the Commission's regulations, the provisions of this Act or the regulations or laws of the United States or any authorized agency or board thereof. Any such certificate so revoked or suspended may be reinstated upon order of the Commission on its own motion or upon application of the air carrier, when the Commission finds reinstatement to be in the public interest. In determining the existence of a public convenience and necessity for a proposed air service, the Commission shall consider the encouragement and development of an intrastate air transportation system properly adapted to the present and future needs of the State of Texas, and in addition shall consider the financial responsibility of the air carrier, its proposed routes and rates or charges, the effect, if any, upon existing air carriers and CAB certificated carriers, and any other factors similarly related to public convenience and necessity. Nothing in this Act affects any litigation pending on the effective date of this Act.

(c) No application for a certificate shall be received and filed by the Commission unless the same shall be in writing

under oath in original and six copies filed with the Director of the Commission and contain the following information:

(1) The name and address of the applicant and the names and addresses of its officers, if any, and full information concerning the financial condition and physical properties of the applicant.

(2) The complete route or routes over which the applicant desires to operate, together with the description of each aircraft which the applicant intends to use.

(3) A proposed schedule of service and a schedule of rates to be charged between the several points or localities to be served.

(4) It shall be accompanied by plats or maps showing the route or routes over which the applicant desires to operate, on which plats or maps shall be delineated the line or lines of any existing air carrier or airlines, whether or not subject to this Act, serving such territory, and shall point out the need for additional air transportation facilities.

(5) Such other information, exhibits and other data in regard to the application as may be required by duly promulgated rules and regulations of the Commission.

(6) Every application filed with the Commission for a certificate shall be accompanied by a filing fee in the sum of $50, which fee shall be in addition to any other fees and taxes and shall be retained by the Commission, whether the application is approved or not, to defray operating expenses.

Copies of such application shall be transmitted contemporaneously to the Civil Aeronautics Board, the Federal Aviation Administration and to any air carrier or CAB certificated carrier, which serves, or is authorized to serve, over the routes proposed to be served by the applicant, or any portion thereof. Upon receipt of such application in proper form, the Commission shall set a date for public hearing which may be conducted by the Commission, or at its discretion, by the Director, or any staff member of the Commission.

Any other provision of this Act notwithstanding, carriers

certificated by the Civil Aeronautics Board pursuant to the Federal Aviation Act of 1958, as now or hereafter amended, together with any other interested party shall be afforded the right to appear and present evidence and arguments at such hearings on all issues involved in any such hearing held under the provisions of this Act. The final determination of such application shall be made by the Commission by written order setting forth its findings and served upon the parties in such manner as the Commission shall specify, and such application may be granted or denied, in whole, or in part; provided, however, any service not specifically authorized shall be deemed specifically denied.

(d) Any certificate held, owned or obtained by any air carrier operating under the provisions of this Act may be sold, assigned, leased, transferred or inherited; provided, however, that any proposed sale, lease, assignment or transfer shall be first presented in writing to the Commission for its approval or disapproval and after public notice and public hearing the Commission may disapprove such proposed sale, assignment, lease or transfer if it is found and determined by the Commission that such proposed sale, assignment, lease or transfer is not in good faith or that the proposed purchaser, assignee, lessee or transferee is not in good faith or that the proposed purchaser, assignee, lessee or transferee is not able or capable of continuing the operation of the equipment proposed to be sold, assigned, leased, or transferred in such manner as to render the services demanded by the public convenience and necessity on and along a designated route, or that the proposed sale, assignment, lease or transfer is not in the best public interest. The Commission in approving or disapproving any sale, assignment, lease or transfer of any certificate may take into consideration all the requirements and qualifications of a regular applicant required in this Act and apply the same as necessary qualifications of any proposed purchaser, assignee, lessee or transferee. Every application filed with the Commission for an order approving the lease, sale or transfer of any certificate of convenience and necessity shall be accompanied by a filing fee in the sum of $25, which fee shall be in addition to any other fees and taxes and shall be retained

by the Commission whether the lease, sale, or transfer of the certificate is approved or not.

(e) If any air carrier or other party in interest be adversely affected by any decision, rate, charge, order, rule, act or regulation adopted by the Commission, that party, after failing to get relief from the Commission, may file a petition setting forth its particular objections to the action of the Commission in the District Court of Travis County, Texas, against the Commission as defendant. This action shall have precedence over all other causes on the docket of a different nature. All decisions, rates, charges, orders, rules, acts or regulations adopted or approved by the Commission shall be sustained in the District Court unless there is no substantial evidence to support them. The appeal shall be tried de novo as an appeal from Justice Court to the County Court. The District Court shall not be bound thereby, but, upon motion of any party to the proceedings, the record of the proceedings made before the Commission of the proceedings under review may be admissible in the District Court. Appeals from any final judgment of the District Court may be taken by any party to the cause in the manner provided for in civil actions generally, but no appeal bond shall be required of the Commission.

(f) Every officer, agent, servant or employee of any corporation and every other person who violates or fails to comply with or procures, aids or abets in the violation of any provision of this Act or who violates or fails to obey, observe or comply with any lawful order, decision, rule or regulation, direction, demand or requirement of the Commission shall be subject to and shall pay a penalty not exceeding $100 for each and every day of such violation. The penalty shall be recovered in any court of competent jurisdiction in the county in which the violation occurs. Suit for the penalty or penalties shall be instituted and conducted by the Attorney General of the State of Texas, or by the county or district attorney in the county in which the violation occurs in the name of the State of Texas. Upon violation of any provision of this Act, or upon the violation of any rule, regulation, order or decree of the Commission promulgated under the terms of this Act,

any district court of any county where such violation occurs shall have the power to restrain and enjoin the person, firm or corporation so offending from further violating the provisions of this Act or from further violating any of the rules, regulations, orders, and decrees of the Commission. Such injunctive relief may be granted upon the application of the Commission, the attorney general or any district or county attorney. No bond shall be required when such injunctive relief is sought upon the application of the Commission, attorney general or any district or county attorney. Such relief may be granted in suits for penalties as provided in this section, but suit for penalties shall not be a condition precedent to the injunctive relief provided hereby.

Subdivision 4. Cooperation with the United States. The Commission shall work with the agencies of the United States in enforcing the statutes, directives, rules and regulations of the United States. It is authorized to report to the appropriate federal agencies and agencies of other states all proceedings instituted charging violations of this Act or of federal statutes. It is authorized to receive reports of penalties and other data from agencies of the United States and other states, and when necessary, to enter into agreements, approved by the Attorney General of Texas as to form, with the United States and the agencies of other states governing the delivery, receipt, exchange and use of reports and data. The Commission may make such reports, with or without request therefor, to any officer of the state or of a municipality authorized by the Commission or by the United States to enforce the aeronautics laws, but such reports shall not constitute evidence of any violation nor shall the same be received as evidence by any court.

Subdivision 5. Aircraft Operation. Aircraft shall be operated in and over the state in a safe manner. Operation shall be deemed safe if conducted in compliance with the United States laws and regulations governing air traffic and aeronautical operation, now in existence or hereafter enacted.

Subdivision 6. Airports and Navigation Aids, Gifts, Leases. (a) To develop aeronautics for the common good, benefit, and safety of the citizens of Texas, and to provide for

catastrophe, disaster, or state or national emergency, the state, or the Texas Aeronautics Commission on behalf of the state, is granted the right, under its police power, to accept gifts or donations of all or any parts of lands on, adjacent to, or utilizable as, airports or airstrips, or utilizable as a navigational aid, in the judgment of the Texas Aeronautics Commission, from the United States or any agency thereof or from any governmental, municipal, or other political subdivision of this state, or from any other person, firm, association, group, or corporation. The same shall be administered by the Texas Aeronautics Commission and shall be and remain under its control and jurisdiction. The Texas Aeronautics Commission is hereby granted the right to utilize such portion of the Texas Aeronautics Commission Fund, or other moneys appropriated to it by the Legislature, to construct improvements, facilities or navigational aids thereon as the commission shall deem advisable or necessary. The commission is granted the right to rent or lease such lands and improvements to any governmental or municipal agency or subdivision, or to any other person, firm, association, group, or corporation, provided any such lease so executed by the commission shall be for a term not to exceed 20 years, and provided further, the Texas Aeronautics Commission shall determine, after investigation, and reduce its findings to writing in a book or books to be maintained in the office of the Texas Aeronautics Commission for that purpose: (1) that the lease is desirable or essential for the purpose above stated; (2) that the lessee is financially responsible; and (3) that the amount of monthly or periodic rental payments shall be sufficient to amortize the amount it has expended thereon for improvements within the term of the lease. Any such lease, before the same shall become effective, shall be submitted to, and approved by the attorney general as to form. Any such lease shall provide that the lessee shall maintain the land, premises and improvements placed thereon by the Texas Aeronautics Commission in accordance with the standards prescribed by the Texas Aeronautics Commission and shall contain a provision that the lease shall immediately terminate and that the lessee shall surrender the premises to the Texas Aeronautics Commission

without liability, and without court action, in the event of violation of any of the provisions of the lease, or any rule, regulation or order of the Texas Aeronautics Commission pertaining thereto; and provided further, the Texas Aeronautics Commission shall have the right to utilize the same, or any part thereof, for itself or others, without liability or cost, in time of national or state disaster, emergency, or catastrophe, as determined by either the Governor of Texas or the Texas Aeronautics Commission.

(b) Independently and additionally, the Commission shall be authorized to accept any grant, payment, or gift of moneys, funds or property made to it by any person, individual, firm, association, corporation, municipality, county, or other political subdivision of the state, or from the United States, or any department or agency thereof, as to which the donor has prescribed a particular use for one or more aeronautical purposes. The Commission shall utilize any such grant of property in accordance with the terms of the grant, and as to any such payment, or gift of funds or moneys, the Commission shall (1) deposit the same in any one or more state or national banks approved by the State Depository Board as a depository of the public funds of Texas, and shall (2) utilize such moneys for the purpose or purposes prescribed by the donor. A record shall be maintained in the Commission's offices of such properties and funds. Such funds shall be expended only upon general or special order of the Commission, and all checks shall be signed by the Director and countersigned by the Chairman of the Commission, or some other Commissioner designated by a majority of the Commission to so countersign. Reports of any such expenditures shall be made at the end of each fiscal year to the Comptroller of Public Accounts of the State of Texas.

Subdivision 7. Investigations, Hearings (General). The Commission shall have the power to conduct and hold investigations, inquiries, and hearings concerning matters covered by the provisions of this Act and the rules, regulations and orders of the Commission, unless specifically provided otherwise herein. Hearings shall be open to the public. Each member of the Commission, the Director and every officer or employee

of the Commission, designated by it to hold an inquiry, investigation or hearing, shall have the power to administer oaths, certify to all official acts, issue subpoenas, and order the attendance and testimony of witnesses and the production of papers, books and documents. Each subpoenaed witness who shall appear at a designated place outside the county of his residence shall receive for his attendance Five Dollars per day and six cents per mile traveled by the nearest practicable route in going to and returning from the place so designated, which shall be ordered paid, on the presentation of proper vouchers, sworn to by such witness and approved by the Commission or Chairman thereof, provided, no witness shall be entitled to any witness fees or mileage who is directly or indirectly interested or involved in the investigation or hearing on account of which he is summoned. Any witness entitled to be paid shall be paid out of any funds so appropriated by the Legislature, or out of the Texas Aeronautics Commission Fund. In the case of the failure of any person to comply with any subpoena or order issued under the authority of this section, the Commission shall notify the attorney general who may bring suit in the name of the state in any district court of Travis County, Texas. The court, if it determines such noncompliance was not justified, shall thereupon order such person to comply with the requirements of the subpoena or order, and failure to obey the order of the court may be punished by the court as a contempt thereof.

Subdivision 8. Education, Publications. The Commission may organize and administer a program of aeronautical education in the schools and colleges of the state and for the general public and may prepare and conduct flight clinics for airmen. The Commission may issue such aeronautical publications as may be required in the public interest.

Subdivision 9. Technical Services. In the interest of public safety and welfare, the Commission may, insofar as is reasonably possible, make available its engineering and technical services, with or without charge, to any municipality or person desiring them in connection with the planning, acquisition, construction, improvement, maintenance or operation of airports, air navigation facilities or other aeronautical activities.

Subdivision 10. Grants or Loans. When in the discretion of the Commission the public interest will best be served, and the governmental function of the state or its political subdivisions relative to aeronautics will best be discharged, it may grant or loan funds, appropriated to it for that purpose by the Legislature, to any state agency with a governing board that is authorized to operate airports, and to any incorporated city, town or village in this state for the establishment, construction, reconstruction, enlargement or repair of airports, airstrips or air navigational facilities. Provided that any such funds must be expended by the city, town or village for the purpose provided herein and in conformity with the laws of this state and with the rules and regulations which the Commission is hereby authorized to promulgate.

Prior to approving any loan or grant under this Act the Commission shall hold a public hearing at which all interested parties shall have an opportunity to be heard. No such loan shall be made without a majority vote of the entire Commission in favor thereof and no such grant shall be made without a two-thirds vote of the entire Commission in favor thereof. In determining whether or not a grant or loan shall be made, the Commission shall consider the following:

(1) The need for an airport or facility or improvement of existing facility in the locality in the light of existing airports or facilities in the area and in light of the overall needs of the state, and

(2) The financial needs of the community with priority given to areas of greatest need.

(3) Loans shall be made in lieu of grants whenever feasible. Prior to approving any loan or grant the Commission shall require that:

(1) The airport or facility remain in the control of the political subdivision or political subdivisions involved for at least 20 years, and

(2) The political subdivision disclose the source of all funds for the project and its ability to finance and operate the project, and

(3) All loans shall bear interest at the rate of at least three percent per annum and have a term of not longer than 20 years, and

(4) At least fifty percent of the total project cost be provided from sources other than the State of Texas, and

(5) The project be adequately planned.

Amended by Acts 1969, 61st Leg., p. 1394, ch. 424, § 1, eff. Sept. 1, 1969.

Art. 46c—7. Director of Aeronautics

Subdivision 1. Appointment, Compensation. A Director of Aeronautics shall be appointed by the Commission. He shall receive such compensation as may be provided in the biennial department appropriation bill and shall be reimbursed for all traveling and other expenses incurred by him in the discharge of his official duties.

Subdivision 2. Powers and Duties. The Director shall be the executive officer of the Commission and under its supervision shall administer the provisions of this Act (and the rules, regulations, and orders established thereunder), and all other laws of the state relative to aeronautics. He shall attend all meetings of the Commission, but shall not have the power to vote. At the direction of the Commission he shall, together with the Chairman of the Commission, execute all contracts entered into by the Commission which are legally authorized and for which funds are provided by this Act, as amended, or in any appropriation Act.

Amended by Acts 1969, 61st Leg., p. 1394, ch. 424, § 1, eff. Sept. 1, 1969.

Art. 46c—8. Hearings, Judicial Review, and Court Aid

The Commission is authorized to enforce the provisions of this Act, by revocation or suspension of any lease or permit; in the event of violation of this Act, the Commission shall notify the attorney general thereof, who is authorized to enforce the same by bringing a suit in any of the district courts of the

county of the residence of the defendant in such action, and any such court may enforce the same by injunction or other appropriate legal process.

Amended by Acts 1969, 61st Leg., p. 1394, ch. 424, § 1, eff. Sept. 1, 1969.

APPENDIX F

FEDERAL AIRPORT ACT OF 1946
49 U.S.C. §§1101 et. seq.

§ 1101. Definitions; airport classifications

(a) As used in this chapter—

(1) "Administrator" means the Administrator of the Federal Aviation Agency.

(2) "Airport" means any area of land or water which is used, or intended for use, for the landing and take-off of aircraft, and any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

(3) "Airport development" means (A) any work involved in constructing, improving, or repairing a public airport or portion thereof, including the construction, alteration, and repair of airport passenger or freight terminal buildings and other airport administrative buildings and the removal, lowering, relocation, and marking and lighting of airport hazards, and (B) any acquisition of land or of any interest therein, or of any easement through or other interest in air space, which is necessary to permit any such work or to remove or mitigate or prevent or limit the establishment of, airport hazards; but such term does not include the construction, alteration, or repair of airport hangars.

(4) "Airport hazard" means any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the air space required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft.

(5) "Project" means a project for the accomplishment of airport development with respect to a particular airport.

(6) "Project costs" means any costs involved in accomplishing a project under this chapter, including those of making field surveys, preparation of plans and specifications, supervision and inspection of construction work, procurement of the accomplishment of such work by contract, and acquisition of

land or interests therein or easements through or other interests in air space, and also including administrative and other incidental costs incurred specifically in connection with the accomplishment of a project, and which would not have been incurred otherwise.

(7) "Public agency" means the United States Government or an agency thereof; a State, or Puerto Rico and the Virgin Islands, or an agency of any of them; a municipality or other political subdivision; or a tax-supported organization.

(8) "Public airport" means any airport which is used or to be used for public purposes, under the control of a public agency, the landing area of which is publicly owned.

(9) "Sponsor" means any public agency which, either individually or jointly with one or more other public agencies, submits to the Administrator, in accordance with this chapter, an application for a grant of funds for airport development.

(10) "United States share" means that portion of the project costs of approved projects under this chapter which is to be paid from appropriations made under authority of this chapter.

(11) "Military and naval aircraft" means aircraft owned and operated by the United States Army, the United States Navy, the United States Coast Guard, or the United States Marine Corps.

(12) "State" means a State of the United States or the District of Columbia.

§ 1102. Formulation of national airport plan; consultation with the Departments of the Army and Navy and the Secretary of the Interior

(a) The Administrator is authorized and directed to prepare, and thereafter, at least three months prior to the close of each fiscal year, to revise, a national plan for the development of public airports in the United States, including Puerto Rico, and the Virgin Islands. Such plans shall specify, in terms of general location and type of development, the projects considered by the Administrator to be necessary to provide a system of public airports adequate to anticipate and meet the needs of civil aeronautics, which projects shall include all types of airport development eligible for Federal aid under this chapter and shall not be limited to any classes or categories of public airports. In formulating and revising such plan, the Ad-

ministrator shall take into account the needs of both air commerce and private flying, the probable technological developments in the science of aeronautics, the probable growth and requirements of civil aeronautics, and such other considerations as he may deem appropriate, and shall, to the extent feasible, consult, and give consideration to the views and recommendations of, the Civil Aeronautics Board, the States, Puerto Rico and the Virgin Islands, and their political subdivisions, and shall, to the extent feasible, consult, and give consideration to the views and recommendations of, the Federal Communications Commission, and shall make all reasonable efforts to cooperate with that Commission for the purpose of eliminating, preventing, or minimizing airport hazards caused by construction or operation of any radio station. In carrying out this section the Administrator is authorized to make such surveys, studies, examinations, and investigations as he may deem necessary.

§ 1103. Money grants to airport development sponsors; announcement and revision of program

(a) In order to help accomplish, in conformity with the national airport plan prepared and from time to time revised as provided in this chapter, the establishment of a public system of public airports adequate to meet the present and future needs of civil aeronautics, the Administrator is authorized, within the limits of the obligational authority provided in section 1104 of this title, to make grants of funds to sponsors for airport development projects for which he provides

(b) It shall be the duty of the Administrator to make public, by the May 1 of each year, the projected allocations of airport development intended to be made from the funds to be made available during the fiscal year next ensuing, and he may revise such allocations to the extent he finds necessary to accomplish the purposes of this chapter.

§ 1103. Project applications—Submission

(a) Subject to the provisions of subsections (b) and (c) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Administrator a project application in such form, and containing such supporting information, as may be prescribed by the Administrator and setting forth the airport development

ment proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport plan formulated by the Administrator under this chapter, and all such proposed development shall be in accordance with standards established by the Administrator, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, and safety of approaches.

Public agencies subject to State law

(b) Nothing in this chapter shall authorize the submission of a project application by any municipality or other public agency which is subject to the law of any State if the submission of such project application by such municipality or other public agency is prohibited by the law of such State.

Federal agencies

(c) Nothing in this chapter shall authorize the submission of a project application by the United States or any agency thereof, except in the case of a project in Puerto Rico, the Virgin Islands, or in, or in close proximity to, a national park, national recreation area, or national monument, or in a national forest, or a special reservation for Government purposes.

Approval

(d) (1) All such projects shall be subject to the approval of the Administrator, which approval shall be given only if he is satisfied that the project will contribute to the accomplishment of the purposes of this chapter, that sufficient funds are available for that portion of the project cost which is not to be paid by the United States under this chapter, that the project will be completed without undue delay, that the public agency or public agencies which submitted the project application have legal authority to engage in the airport development as proposed, and that all project sponsorship requirements prescribed by or under the authority of this chapter have been or will be met. No project shall be approved by the Administrator with respect to any airport unless a public agency holds good title, satisfactory to the Administrator, to the landing area of such airport or the site therefor, or gives assurance satisfactory to the Administrator that such title will be acquired.

(2) No project shall be approved by the Administrator which does not include provision for installation of such of the landing aids specified in section 1109(d) of this title as are determined by him to

be required for the safe and efficient use by aircraft of the airport, taking into account the category of the aircraft and the type and volume of traffic utilizing the airport.

(3) No projects shall be approved by the Administrator unless he is satisfied that fair consideration has been given to the interest of communities in or near which such project may be located.

Hearings

(e) Project applications shall be matters of public record in the office of the Administrator. Any public agency, person, association, firm, or corporation having a substantial interest in the disposition of any application by the Administrator may file with the Administrator a memorandum in support of or in opposition to such application; and any such agency, person, association, firm, or corporation shall be accorded, upon request, a public hearing with respect to the location of any airport the development of which is proposed. The Administrator is authorized to prescribe regulations governing such public hearings, and such regulations may prescribe a reasonable time within which requests for public hearings shall be made and such other reasonable requirements as may be necessary to avoid undue delay in disposing of project applications.

§ 1110. Project sponsorship; requirements; contracts between Administrator and public agencies; relief of sponsors

As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination;

(2) such airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

(3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

(4) all the facilities of the airport developed with Federal aid and all those usable for the landing and take-off of aircraft will be available to the United States for use by military and naval aircraft in common with other aircraft at all times without charge, except, if the use by military and naval aircraft shall be substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities so used;

(5) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the sponsor as the Administrator may consider necessary or desirable for construction at Federal expense of space or facilities for such purposes;

(6) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Administrator after consultation with appropriate public agencies;

(7) the airport operator or owner will submit to the Administrator such annual or special airport financial and operations reports as the Administrator may reasonably request; and

(8) the airport and all airport records will be available for inspection by any duly authorized agent of the Administrator upon reasonable request.

To insure compliance with this section, the Administrator shall prescribe such project sponsorship requirements, consistent with the terms of this chapter, as he may deem necessary. Among other steps to insure such compliance the Administrator is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Administrator shall obtain from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and shall construct thereon at Federal expense space or facilities, he is authorized to relieve the sponsor from any contractual obligation entered into under this chapter to provide free space in airport buildings to the Federal Government to the extent he finds such space no longer required for the purposes set forth in paragraph (5) of this section.

§ 1111. Grant agreements; offer of terms and conditions; acceptance

Upon approving a project the Administrator, on behalf of the United States, shall transmit to the sponsor or sponsors of the project an offer to pay the United States' share of the allowable project costs of such project. Any such offer shall be made upon such terms, and subject to such conditions, as the Administrator may deem necessary to meet the requirements of this chapter and the regulations prescribed thereunder. Each such offer shall state a definite amount as the maximum obligation of the United States payable from funds authorized by this chapter, and shall stipulate the obligations to be assumed by the sponsor or sponsors of the project. If and when any such offer is accepted in writing by the sponsor or sponsors to which it is made, such offer and acceptance shall comprise a grant agreement constituting an obligation of the United States and of the sponsor or sponsors so accepting, and thereafter the amount stated in the accepted offer as the maximum obligation of the United States under such grant agreement shall not be increased by more than 10 per centum. Unless and until such a grant agreement has been executed with respect to a project, the United States shall not pay, nor be obligated to pay, any portion of the project costs which have been or may be incurred in carrying out that project.

APPENDIX G

FEDERAL AVIATION ACT OF 1958
49 U.S.C. §§1301 et. seq.

SUBCHAPTER I.--GENERAL PROVISIONS

§ 1301. Definitions

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

SUBCHAPTER III.—ORGANIZATION OF ADMINISTRATION; POWERS AND DUTIES OF ADMINISTRATOR

§ 1341. Federal Aviation Administration—Establishment; Administrator; appointment; powers and duties

(a) There is established the Federal Aviation Administration, referred to in this chapter as the "Administration." The Administration shall be headed by an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate. The Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Administration, and shall have authority and control over all personnel and activities thereof. In the exercise of his duties and the discharge of his responsibilities under this chapter, the Administrator shall not submit his decisions for the approval of, nor be bound by the decisions or recommendations of, any committee, board, or other organization created by Executive order.

Qualifications of Administrator

(b) The Administrator shall be a citizen of the United States, and shall be appointed with due regard for his fitness for the efficient discharge of the powers and duties vested in and imposed upon him

by this chapter. At the time of his nomination he shall be a civilian and shall have had experience in a field directly related to aviation. The Administrator shall have no pecuniary interest in or own any stock in or bonds of any aeronautical enterprise nor shall he engage in any other business, vocation, or employment.

§ 1348. Airspace control and facilities—Use of airspace

(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign, by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

Air navigation facilities

(b) The Administrator is authorized, within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic.

Air traffic rules

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

Applicability of Administrative Procedure Act

(d) In the exercise of the rulemaking authority under subsections (a) and (c) of this section, the Administrator shall be subject to the provisions of the Administrative Procedure Act, notwithstanding any exception relating to military or naval functions in section 1003 of Title 5.

Exemptions

(c) The Administrator from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest.

§ 1349. Expenditure of Federal funds for certain airports and air navigation facilities; location of airports, landing areas

(a) No Federal funds, other than those expended under this chapter, shall be expended, other than for military purposes (whether or not in cooperation with State or other local governmental agencies), for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area, or for the acquisition, establishment, construction, maintenance, or operation of air navigation facilities thereon, except upon written recommendation and certification by the Administrator that such landing area or facility is reasonably necessary for use in air commerce or in the interests of national defense. Any interested person may apply to the Administrator, under regulations prescribed by him, for such recommendation and certification with respect to any landing area or air navigation facility proposed to be established, constructed, altered, repaired, maintained, or operated by, or in the interests of, such person. There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.

§ 1350. Establishment or construction of airports and landing areas not involving expenditure of Federal funds

In order to assure conformity to plans and policies for, and allocations of, airspace by the Administrator under section 1348 of this title, no airport or landing area not involving expenditure of Federal funds shall be established, or constructed, or any runway layout substantially altered unless reasonable prior notice thereof is given the Administrator, pursuant to regulations prescribed by him, so that he may advise as to the effects of such construction on the use of airspace by aircraft.

APPENDIX H

THE AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970
49 U.S.C. §§1701 et. seq.

SUBCHAPTER I.—GENERAL PROVISIONS

§ 1701. Congressional declaration of policy

The Congress hereby finds and declares—

That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.

That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense.

That the annual obligational authority during the period July 1, 1970, through June 30, 1980, for the acquisition, establishment, and improvement of air navigational facilities under the Federal Aviation Act of 1958, should be no less than $250,000,000.

That the obligational authority during the period July 1, 1970, through June 30, 1980, for airport assistance under this chapter should be $2,500,000,000.

SUBCHAPTER II.—AIRPORT AND AIRWAY DEVELOPMENT

§ 1711. Definitions

As used in this subchapter—

(1) "Airport" means any area of land or water which is used, or intended for use, for the landing and takeoff of aircraft, and any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

(2) "Airport development" and security equipment required of the sponsor by the Secretary by rule or regulation for the safety and security of persons and property on the airport, means (A) any work involved in constructing, improving, or repairing a public airport or portion thereof, including the removal, lowering, relocation, and marking and lighting of airport hazards, and including navigation aids used by aircraft landing at, or taking off from, a public airport, and including safety equipment required by rule or regulation for certification of the airport under section 1432 of this title, and (B) any acquisition of land or of any interest therein, or of any easement through or other interest in airspace, including land for future airport development, which is necessary to permit any such work or to remove or mitigate or prevent or limit the establishment of, airport hazards.

(3) "Airport hazard" means any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the airspace required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft.

(4) "Airport master planning" means the development for planning purposes of information and guidance to determine the extent, type, and nature of development needed at a specific airport. It may include the preparation of an airport layout plan and feasibility studies, and the conduct of such other studies, surveys, and planning actions as may be necessary to determine the short-, intermediate-, and long-range aeronautical demands required to be met by a particular airport as a part of a system of airports.

(5) "Airport system planning" means the development for planning purposes of information and guidance to determine the extent, type, nature, location, and timing of airport development needed in a specific area to establish a viable and balanced system of public airports. It includes identification of the specific aeronautical role of each airport within the system, development of estimates of system-wide development costs, and the conduct of such studies, surveys, and other planning actions as may be necessary to determine the short-, intermediate-, and long-range aeronautical demands required to be met by a particular system of airports.

(6) "Landing area" means that area used or intended to be used for the landing, takeoff, or surface maneuvering of aircraft.

(7) "Government aircraft" means aircraft owned and operated by the United States.

(8) "Planning agency" means any planning agency designated by the Secretary which is authorized by the laws of the State or States (including the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and Guam) or political subdivisions concerned to engage in areawide planning for the areas in which assistance under this subchapter is to be used.

(9) "Project" means a project for the accomplishment of airport development, airport master planning, or airport system planning.

(10) "Project costs" means any costs involved in accomplishing a project.

(11) "Public agency" means a State, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, or Guam or any agency of any of them; a municipality or other political subdivision; or a tax-supported organization; or an Indian tribe or pueblo.

§ 1712. National airport system plan—Formulation

(a) The Secretary is directed to prepare and publish, within three years after May 21, 1970, and thereafter to review and revise as neces-

sary, a national airport system plan for the development of public airports in the United States. The plan shall set forth, for at least a ten-year period, the type and estimated cost of airport development considered by the Secretary to be necessary to provide a system of public airports adequate to anticipate and meet the needs of civil aeronautics, to meet requirements in support of the national defense as determined by the Secretary of Defense, and to meet the special needs of the postal service. The plan shall include all types of airport development eligible for Federal aid under section 1714 of this title, and terminal area development considered necessary to provide for the efficient accommodation of persons and goods at public airports, and the conduct of functions in operational support of the airport. Airport development identified by the plan shall not be limited to the requirements of any classes or categories of public airports. In preparing the plan, the Secretary shall consider the needs of all segments of civil aviation.

Consideration of other modes of transportation

(b) In formulating and revising the plan, the Secretary shall take into consideration, among other things, the relationship of each airport to the rest of the transportation system in the particular area, to the forecasted technological developments in aeronautics, and to developments forecasted in other modes of intercity transportation.

Federal, State, and other agencies

(c) In developing the national airport system plan, the Secretary shall to the extent feasible consult with the Civil Aeronautics Board, the Post Office Department, the Department of the Interior regarding conservation and natural resource values, and other Federal agencies, as appropriate; with planning agencies, and airport operators; and with air carriers, aircraft manufacturers, and others in the aviation industry. The Secretary shall provide technical guidance to agencies engaged in the conduct of airport system planning and airport master planning to insure that the national airport system plan reflects the product of interstate, State, and local airport planning.

Cooperation with Federal Communications Commission

(d) The Secretary shall, to the extent possible, consult, and give consideration to the views and recommendations of the Federal Communications Commission, and shall make all reasonable efforts to cooperate with that Commission for the purpose of eliminating, preventing, or minimizing airport hazards caused by the construction or operation of any radio or television station. In carrying out this section, the Secretary may make any necessary surveys, studies, examinations, and investigations.

Consultation with Department of Defense

(e) The Department of Defense shall make military airports and airport facilities available for civil use to the extent feasible. In advising

the Secretary of national defense requirements pursuant to subsection (a) of this section, the Secretary of Defense shall indicate the extent to which military airports and airport facilities will be available for civil use.

Consultation concerning environmental changes

(f) In carrying out this section, the Secretary shall consult with and consider the views and recommendations of the Secretary of the Interior, the Secretary of Health, Education, and Welfare, the Secretary of Agriculture, and the National Council on Environmental Quality. The recommendations of the Secretary of the Interior, the Secretary of Health, Education, and Welfare, the Secretary of Agriculture, and the National Council on Environmental Quality, with regard to the preservation of environmental quality, shall, to the extent that the Secretary of Transportation determines to be feasible, be incorporated in the national airport system plan.

§ 1718. Planning grants—Authorization to make grants

(a) In order to promote the effective location and development of airports and the development of an adequate national airport system plan, the Secretary may make grants of funds to planning agencies for airport system planning, and to public agencies for airport master planning.

Amount and apportionment of grants

(b) The award of grants under subsection (a) of this section is subject to the following limitations:

(1) The total funds obligated for grants under this section may not exceed $75,000,000 and the amount obligated in any one fiscal year may not exceed $15,000,000.

(2) No grant under this section may exceed two-thirds of the cost incurred in the accomplishment of the project.

(3) No more than 7.5 per centum of the funds made available under this section in any fiscal year may be allocated for projects within a single State, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, or Guam. Grants for projects encompassing an area located in two or more States shall be charged to each State in the proportion which the number of square miles the project encompasses in each State bears to the square miles encompassed by the entire project.

Regulations; coordination with Secretary of Housing and Urban Development

(c) The Secretary may prescribe such regulations as he deems necessary governing the award and administration of grants authorized by this section. The Secretary and the Secretary of Housing and Urban Development shall develop jointly procedures designed to preclude duplication of their respective planning assistance activities and to ensure that such activities are effectively coordinated.

§ 1714. Airport and airway development program—General authority.

(a) In order to bring about, in conformity with the national airport system plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Secretary is authorized to make grants for airport development by grant agreements with sponsors in aggregate amounts not less than the following:

(1) For the purpose of developing in the several States, the Commonwealth of Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Virgin Islands, airports served by air carriers certificated by the Civil Aeronautics Board, and airports the primary purpose of which is to serve general aviation and to relieve congestion at airports having a high density of traffic serving other segments of aviation, $250,000,000 for each of the fiscal years 1971 through 1973, and $275,000,000 for each of the fiscal years 1974 and 1975.

(2) For the purpose of developing in the several States, the Commonwealth of Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Virgin Islands, airports serving segments of aviation other than air carriers certificated by the Civil Aeronautics Board, $[illegible],000,000 for each of the fiscal years 1971 through 1973, and $35,000,000 for each of the fiscal years 1974 and 1975.

Obligational authority

(b) To facilitate orderly long-term planning by sponsors, the Secretary is authorized, effective on May 21, 1970, to incur obligations to make grants for airport development from funds made available under this subchapter for the fiscal year ending June 30, 1971, and the succeeding four fiscal years in a total amount not to exceed $1,460,000,000. No obligation shall be incurred under this subsection for a period of more than three fiscal years and no such obligation shall be incurred after June 30, 1975. The Secretary shall not incur more than one obligation under this subsection with respect to any single project for airport development. Obligations incurred under this subsection shall not be liquidated in an aggregate amount exceeding $280,000,000 prior to June 30, 1971, an aggregate amount exceeding $560,000,000 prior to June 30, 1972, and an aggregate amount exceeding $840,000,000 prior to June 30, 1973, an aggregate amount exceeding $1,150,000,000 prior to June 30, 1974, and an aggregate amount exceeding $1,460,000,000 prior to June 30, 1975.

Airway facilities

(c) For the purpose of acquiring, establishing, and improving air navigation facilities under section 1348(b) of this title, the Secretary is authorized, within the limits established in appropriations Acts, to obligate for expenditure not less than $250,000,000 for each of the fiscal years 1971 through 1975.

Other expenses

(d) The balance of the moneys available in the trust fund may be allocated for the necessary administrative expenses incident to the administration of programs for which funds are to be allocated as set forth in subsections (a), (b), and (c) of this section, and for research and development activities under section 1353(c) of this title (as it relates to safety in air navigation). The initial $50,000,000 of any sums appropriated to the trust fund pursuant to subsection (d) of section 1742 of this title shall be allocated to such research and development activities.

Preservation of funds and priority for airport and airway programs

(e) (1) Notwithstanding any other provision of law to the contrary, no amounts may be appropriated from the trust fund to carry out any program or activity under the Federal Aviation Act of 1958, except programs or activities referred to in subsections (c) and (d) of this section, as amended.

(2) Amounts equal to the minimum amounts authorized for each fiscal year by subsections (a) and (c) of this section shall remain available in the trust fund until appropriated for the purposes described in such subsections.

(3) No amounts transferred to the trust fund by subsection (b) of section 1742 of this title (relating to aviation user taxes) may be appropriated for any fiscal year to carry out administrative expenses of the Department of Transportation or of any unit thereof except to the extent authorized by subsection (d) of this section.

§ 1716. Project applications for airport development—Submission

(a) Subject to the provisions of subsection (b) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Secretary a project application, in a form and containing such information, as the Secretary may prescribe, setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary under this subchapter, and all proposed development shall be in accordance with standards established by the Secretary, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, and safety of approaches.

Public agencies subject to State law

(b) Nothing in this subchapter shall authorize the submission of a project application by any municipality or other public agency which is subject to the law of any State if the submission of the project application by the municipality or other public agency is prohibited by the law of that State.

Approval

(c)(1) All airport development projects shall be subject to the approval of the Secretary, which approval may be given only if he is satisfied that—

(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purposes of this subchapter;

(B) sufficient funds are available for that portion of the project costs which are not to be paid by the United States under this subchapter;

(C) the project will be completed without undue delay;

(D) the public agency or public agencies which submitted the project application have legal authority to engage in the airport development as proposed; and

(E) all project sponsorship requirements prescribed by or under the authority of this subchapter have been or will be met.

No airport development project may be approved by the Secretary with respect to any airport unless a public agency or the United States or an agency thereof holds good title, satisfactory to the Secretary, to the landing area of the airport or the site therefor, or gives assurance satisfactory to the Secretary that good title will be acquired.

(2) No airport development project may be approved by the Secretary which does not include provision for installation of the landing aids specified in subsection (d) of section 1717 of this title and determined by him to be required for the safe and efficient use of the airport by aircraft taking into account the category of the airport and the type and volume of traffic utilizing the airport.

(3) No airport development project may be approved by the Secretary unless he is satisfied that fair consideration has been given to the interest of communities in or near which the project may be located.

(4) It is declared to be national policy that airport development projects authorized pursuant to this subchapter shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretaries of the Interior and Health, Education, and Welfare with regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect.

Hearings

(5) (A) No airport development project involving the location of an airport, an airport runway, or a runway extension may be approved by the Secretary unless the public agency sponsoring the project certifies

to the Secretary that there has been afforded the opportunity for public hearings for the purpose of considering the economic, social, and environmental effects of the airport location and its consistency with the goals and objectives of such urban planning as has been carried out by the community.

(2) When hearings are held under paragraph (1) of this subsection, the project sponsor shall, when requested by the Secretary, submit a copy of the transcript to the Secretary.

Air and water quality

(e) (1) The Secretary shall not approve any project application for a project involving airport location, a major runway extension, or runway location unless the Governor of the State in which such project may be located certifies in writing to the Secretary that there is reasonable assurance that the project will be located, *designed, constructed,* and operated so as to comply with applicable air and water quality standards. In any case where such standards have not been approved or where such standards have been promulgated by the Secretary of the Interior or the Secretary of Health, Education, and Welfare, certification shall be obtained from the appropriate Secretary. Notice of certification or of refusal to certify shall be provided within sixty days after the project application is received by the Secretary.

(2) The Secretary shall condition approval of any such project application on compliance during construction and operation with applicable air and water quality standards.

Airport site selection; metropolitan area

(f) (1) Whenever the Secretary determines (A) that a metropolitan area comprised of more than one unit of State or local government is in need of an additional airport to adequately meet the air transportation needs of such area, and (B) that an additional airport for such area is consistent with the national airport system plan prepared by the Secretary, he shall notify, in writing, the governing authorities of the area concerned of the need for such additional airport and request such authorities to confer, agree upon a site for the location of such additional airport, and notify the Secretary of their selection. In order to facilitate the selection of a site for an additional airport under the preceding sentence, the Secretary shall exercise such of his authority under this subchapter as he may deem appropriate to carry out the provisions of this paragraph. For the purposes of this subsection, the term "metropolitan area" means a standard metropolitan statistical area as established by the Bureau of the Budget, subject however to such modifications and extensions as the Secretary may determine to be appropriate for the purposes of this subsection.

(2) In the case of a proposed new airport serving any area, which does not include a metropolitan area, the Secretary shall not approve any airport development project with respect to any proposed airport site not approved by the community or communities in which the airport is proposed to be located.

§ 1718. Project sponsorship requirements; compliance; contracts between Secretary and public agencies; air traffic control activities; relief of sponsors

As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that —

Public use

(1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination;

Maintenance and operation

(2) the airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

Airport hazards

(3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

Compatible use of adjacent land

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

Government use; charge

(5) all of the facilities of the airport developed with Federal financial assistance and all those usable for landing and takeoff of aircraft will be available to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, a charge may be made for a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities used;

Air traffic control activities

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting and communication activities related to air traffic control, any areas of land or water, or estate therein, or rights in buildings of the sponsor as the Secretary considers necessary or desirable for construction at Federal expense of space or facilities for such purposes;

Accounting

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Secretary after consultation with appropriate public agencies;

Self-sustaining fee and rental structure

(8) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection;

Reports

(9) the airport operator or owner will submit to the Secretary such annual or special airport financial and operations reports as the Secretary may reasonably request; and

Inspection of records

(10) the airport and all airport records will be available for inspection by any duly authorized agent of the Secretary upon reasonable request.

To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this subchapter, as he considers necessary. Among other steps to insure such compliance the Secretary is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Secretary obtains from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and constructs space or facilities thereon at Federal expense, he is authorized to relieve the sponsor from any contractual obligation entered into under this subchapter or the Federal Airport Act to provide free space in airport buildings to the Federal Government to the extent he finds that space no longer required for the purposes set forth in paragraph (6) of this section.

§ 1719. Grant agreements; offer of terms and conditions; acceptance

Upon approving a project application for airport development, the Secretary, on behalf of the United States, shall transmit to the sponsor or sponsors of the project application an offer to make a grant for the United States share of allowable project costs. An offer shall be made upon such terms and conditions as the Secretary considers necessary to meet the requirements of this subchapter and the regulations prescribed thereunder. Each offer shall state a definite amount as the maximum obligation of the United States payable from funds authorized by this subchapter, and shall stipulate the obligations to be assumed by the sponsor or sponsors. If and when an offer is accepted in writing by the sponsor, the offer and acceptance shall comprise an agreement con-

OCT 22 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Petitioners,*

v.

SOUTHWEST AIRLINES CO. AND THE TEXAS AERONAUTICS COMMISSION, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION AND BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GEORGE S. LAPHAM, JR.
Air Transport Association
of America
1709 New York Avenue, N.W.
Washington, D. C. 20006
Attorney for the Air Transport Association of America

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

MOTION OF THE AIR TRANSPORT ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE 1

BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 1

INTRODUCTION AND STATEMENT OF INTEREST 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 11

I. The Federal Scheme for Determination of the Appropriate Uses of Public Airports Is Pervasive and Comprehensive and It Pre-empts the Authority of State or Local Agencies to Make Independent Determinations 11

II. The Fifth Circuit Ignored the Federal Scheme and Incorrectly Based Its Decision on the Power of the TAC to Regulate Intrastate Air Carriers 20

III. The Fifth Circuit Based its Decision Entirely on an Incorrect Factual Premise and Upon a Clearly Impermissible Interpretation of the Effect of the Certificate and Order Issued by the TAC 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES:

Airport Commission of Forsyth County v. *CAB*, 300 F.2d 185 (4th Cir. 1962) 3

City of Burbank v. *Lockheed Air Terminal*, 411 U.S. 624, 36 L.ed. 2d 547, 93 S.Ct. 1854 (1973) 11, 14

Page

Cooley v. *Board of Wardens*, 12 How. 299, 13 L.ed. 996 (1851) 11, 20
Dallas-Ft. Worth Regional Airport Investigation, Civil Aeronautics Board Order No. E-21341 (1964).... 2
Texas Aeronautics Commission v. *Braniff Airways, Inc.*, 454 S.W.2d 199 (Tex. Sup. 1970) 20, 21
United States v. *City of New Haven*, 496 F.2d 452, appeal filed *sub nom. Town of East Haven* v. *United States*, 43 U.S.L.W., 3124 (July 30, 1974) 20

STATUTES:

Airport and Airway Development Act of 1970
49 U.S.C. § 1701 *et seq.* 8, 15, 16
49 U.S.C. § 1711(5) 16, 18
49 U.S.C. § 1712(a) 15, 16
49 U.S.C. § 1712(c) 16, 18
49 U.S.C. § 1714(a) 17
49 U.S.C. § 1716(a) 17, 18
49 U.S.C. § 1716(c)(1)(A) 17
49 U.S.C. § 1718(1) 18
49 U.S.C. § 1718(8) 5

Federal Airport Act
49 U.S.C. § 1101 *et seq.* 8
49 U.S.C. § 1102 15

Federal Aviation Act of 1958
49 U.S.C. § 1301 ..... 8, 12, 14
49 U.S.C. § 1426 14

Noise Control Act of 1972
42 U.S.C. § 4901 *et seq.* 12

Texas Aeronautics Commission Act, Vernon's Texas Ann. Civ. St., Art. 46c-1 ..... 22, 25

MISCELLANEOUS:

Hearings on H.R. 12711 before Subcommittee of the Senate Committee on Appropriations, Independent Offices Appropriation, 87th Cong. 2d Sess. at 524 (1962) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Petitioners,*

v.

SOUTHWEST AIRLINES CO. AND THE TEXAS AERONAUTICS COMMISSION, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF THE AIR TRANSPORT ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Air Transport Association of America (ATA) respectfully moves the Court for leave to file the within and following Brief of the Air Transport Association of America, as Amicus Curiae, in Support of Petition for Writ of Certiorari upon the following grounds:

1. ATA is a trade association of 26 scheduled air carriers serving approximately 500 American airports and 130 foreign points under licenses issued by the Civil Aeronautics Board (CAB). Its members include

all of the major airlines in this country. As the representative of the nation's scheduled airlines, ATA is vitally interested in the decision in the above case because of its effect upon airports and air transportation throughout the country. It is ATA's belief that this very important case was decided incorrectly by the District Court and the Fifth Circuit Court of Appeals and that unless reversed by this Court it may result in a disruption of the federal scheme for efficient and safe airspace management and for the planning, funding and uses of public airports.

2. While ATA is in general agreement with the facts and arguments set out in the Petition for Writ of Certiorari filed by the cities of Dallas and Ft. Worth (Cities) and the Dallas-Ft. Worth Regional Airport Board (Airport Board), ATA feels that certain factual matters and legal questions have not been presented adequately and that if not so presented by the ATA in the attached brief this Court will not be in a proper position to rule upon the Petition. Thus ATA has concluded that:

> (a) A shorter and more concise statement of the case is necessary to put the case in proper perspective and to give an adequate understanding of how the case arose;
>
> (b) It is necessary to an understanding of the reasons for granting a writ of certiorari in this case that the opinion of the Fifth Circuit be examined and discussed more precisely than in the Petition in order to demonstrate briefly, but forcefully, the grossly erroneous legal and factual premises upon which the opinion was based (*i.e.*, the Court of Appeals' confusion of the power to regulate air carriers with the power to regulate airports and its incorrect interpretation of the

effect of a certificate and order issued by the Texas Aeronautics Commission); and

(c) The preemption under both the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* and the Airport and Airway Development Act of 1970, 49 U.S.C. § 1701 *et seq.* (and the predecessor Federal Airport Act, 49 U.S.C. § 1101 *et seq.*) should be separately (though briefly) articulated to a greater extent than in the Petition in order that the preemption argument be precisely and clearly stated.

3. ATA is mindful that motions for leave to file *amicus curiae* briefs before consideration of the petition for writ of certiorari are not favored under this Court's Rule 42. Nevertheless, this case is of such importance and the factual background is sufficiently complicated that it is felt that the ATA brief will expedite rather than impede the Court's consideration of the case.

4. ATA has received the consent of the cities of Dallas and Ft. Worth and the Dallas-Ft. Worth Regional Airport Board to file its brief, as *amicus curiae,* but Southwest Airlines Co. has refused to consent to the filing.

WHEREFORE, the Air Transport Association of America prays that the Court will grant it leave to file the within and following brief, as *amicus curiae.*

Respectfully submitted,

/s/ GEORGE S. LAPHAM, JR.
George S. Lapham, Jr.
Attorney for the Air Transport Association of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Petitioners,*

v.

SOUTHWEST AIRLINES CO. AND THE TEXAS AERONAUTICS COMMISSION, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION AND STATEMENT OF INTEREST

The Air Transport Association of America (ATA) is a trade association comprised of twenty-six air carrier members, including all of the nation's major scheduled airlines.[1] As the representative of the

[1] All of the member carriers are licensed by the Civil Aeronautics Board to provide interstate, overseas and/or foreign air transportation.

nation's scheduled air carriers, ATA has a significant interest in decisions of the courts which affect the regulation of airspace and airports.

ATA is of the opinion that this case was incorrectly decided by the Fifth Circuit Court of Appeals and that the decision of the Fifth Circuit must be reversed by this Court in order to preserve the federal scheme for the efficient and safe utilization of the nation's airspace and for the planning, funding and uses of airports. Accordingly, ATA supports the Petition for a Writ of Certiorari filed with this Court by the cities of Dallas and Ft. Worth, Texas (Cities), and their administrative arm, the Dallas-Ft. Worth Regional Airport Board (Airport Board).

STATEMENT OF THE CASE

This case was instituted by the Cities' complaint against Southwest Airlines Co. (Southwest), seeking a declaration that the "phase-out" provision of the Cities' joint 1968 Regional Airport Concurrent Bond Ordinance (Bond Ordinance) is valid to preclude Southwest from providing scheduled air carrier service at Love Field in Dallas.

The adoption of the Bond Ordinance for the purpose of financing the Dallas-Ft. Worth Regional Airport (DFW) was the result of a number of federal actions which formally began with a Civil Aeronautics Board (CAB) investigation instituted in 1962 to determine if the public convenience and necessity required CAB certificated carriers to provide scheduled air service to both Dallas and Ft. Worth through a single airport.[2] (Prior to that time service had been pro-

[2] *Dallas-Ft. Worth Regional Airport Investigation*, Docket 13959.

vided at both Dallas' Love Field and Ft. Worth's Greater Southwest International Airport, GSIA, but most of the traffic was through Love Field.) After extensive hearings, the CAB in 1964 issued an order determining that service should be provided through a single airport, but the CAB urged the Cities to agree on an airport rather than having the matter decided by the Board. (Order No. E-21341, dated September 30, 1964).

The CAB investigation had been spurred by the joint policy determination of the CAB and the Federal Aviation Administration (FAA) in 1961 that single airports should be encouraged for adjacent communities when a single airport would result in savings to the federal government and the local communities and in improved air service to the local area. See *Airport Commission of Forsyth County* v. *C.A.B.*, 300 F.2d 185, 187 (4th Cir. 1962).

The FAA as well as the CAB, subsequently concluded that Dallas and Ft. Worth were prime examples of adjacent cities which could best be served through one airport. Accordingly, the FAA refused to grant any additional federal funds for Love Field until the determination of the single airport was made. See statement of FAA Administrator Halaby, *Hearings on H.R. 12711 before Subcommittee of the Senate Committee on Appropriations, Independent Offices Appropriation*, 87th Cong., 2d Sess., at 524 (1962).

It was under these circumstances that the Cities reached and entered into a formal agreement to build the new airport through their administrative arm, the Airport Board. After considerable planning among the FAA, the Cities and other agencies pursuant to the Federal Airport Act, a plan was developed for the use

of the new airport, as well as the existing public airports of the area (the Local Airport System Plan). Under this plan the new airport (DFW), located approximately equal distances from Dallas and Ft. Worth, would handle all scheduled air carrier traffic. GSIA would be closed entirely inasmuch as there would be an overlap with the airspace requirements of DFW. Love Field and Redbird Airports in Dallas and Meacham Field in Ft. Worth would be closed to scheduled air carrier traffic and would be designated to handle all other types of traffic, including the large volumes of general (private) aviation traffic in the area.[3]

The purpose of the plan was to provide a large and expandable major air carrier airport designed to meet the long range needs of the area for scheduled mass transportation, while at the same time utilizing existing public airports for all other traffic so that both mass and general aviation would be afforded adequate facilities. In this way each of these two segments of aviation could expand without infringing upon the facilities required by the other and the most efficient and safe use of the airspace and airports could be achieved. (App. 548-585) Substantial mixing of scheduled air carrier and general aviation traffic—one of the primary causes of costly air traffic delays and potential safety hazards—would be eliminated.[4]

---

[3] See *Over-All Preliminary Plan for Construction of the Dallas-Ft. Worth Regional Airport, September, 1968* (App. 2107-2139, particularly at 2135). Note: References to "App." are to the Appendix filed in the Court of Appeals.

[4] DFW was to be open to general aviation flights, but no significant mixing problems were expected because the general aviation users would have very little incentive to use the new airport (with its substantially higher landing fees) in preference to the three other conveniently located airports which would specialize in general aviation.

It was also recognized by the FAA and the Cities that in order to finance DFW as a self-supporting and economically viable airport, it would be necessary to insure the use of the new airport by *all* scheduled air carrier flights. Otherwise, there would not be sufficient revenues to pay the debt service on revenue bonds to be issued to finance the airport and to pay operating and maintenance expenses. Moreover, the FAA could not justify the very large expenditure of federal funds necessary for DFW without assurance that the Facility would be fully utilized and economically viable.[5]

For the reasons discussed above, the FAA affirmatively insisted, with respect to the planning for DFW and the local system of airports, that the Cities close all airports except DFW to scheduled air carrier flights upon the opening of DFW and the FAA conditioned its approval of plans for the new airport on the commitment of the Cities to so close the other airports. (App. 542) This was agreed to by the Cities and reflected, along with the entire Local Airport System Plan, in the Bond Ordinance which was adopted in 1968 when it became necessary to issue the first series of bonds to begin construction of DFW.

The phase-out provision of the Bond Ordinance requiring, *inter alia*, the closing of Love Field to scheduled flights was responsive to the FAA's condition and was consistent with the provisions of the grant agreements with respect to federal funds which earlier had been granted for Love Field projects. These grant

[5] It later became a requirement under the Airport and Airway Development Act of 1970 that before federal funds could be granted for an airport project, the Secretary of Transportation should be satisfied that the project would be as economically self-sustaining as possible. 49 U.S.C. § 1718(8).

agreements provided that the City of Dallas "may prohibit any given type, kind or class of aeronautical use of the Airport [Love Field] if such action will best serve the aeronautical needs of the area served by the Airport."[6] The phase-out provision, contained in Section 9.5A of the Bond Ordinance, is quoted as follows:

> "It is acknowledged and understood by the Cities that they, in Love Field, Redbird, GSIA and Meacham Field, own and operate airports which by their nature are potentially competitive with the operation of the Regional Airport. It is further acknowledged and recognized that the revenues to be derived from those airport facilities are not, under the terms of this Ordinance, pledged to the payment of the Bonds, except under the circumstances described in Section 6.3 hereof. *Accordingly, the Cities,* each with respect to its own individually owned airport facilities, as above named, hereby covenant and agree that from and after the effective date of this Ordinance, [*each*] *shall take such steps as may be necessary, appropriate, and legally permissible* (without violating presently outstanding legal commitments or covenants prohibiting such action), *to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport.*" [emphasis added] (App. 2195)

The Cities took the steps required by Section 9.5A, through the Airport Board, by executing agreements in February of 1970 with all of the air carriers certificated by the CAB to serve either Dallas or Ft.

---

[6] This language quoted from Part III—Sponsor's Assurances, p. 4, Grant Agreement No. 9-41-106-001, App. 4859-4873.

Worth. Under these agreements the CAB carriers agreed to discontinue service at Love Field and transfer all of their "Certificated Air Carrier Services"[7] to the Regional Airport upon its opening and thereafter to conduct all such services at the Regional Airport. (App. 3691-3775)

The Cities attempted to secure such an agreement from Southwest, but Southwest refused and its refusal led to this case in which the Cities sought to have the district court declare their right to exclude Southwest from Love Field in accordance with the plan adopted pursuant to federal law as reflected in the Bond Ordinance. The district court decided that the Cities do not have such a right and the Fifth Circuit affirmed. The district court decision was based primarily on the conclusion that the phase-out provision was unjustly discriminatory, and on Texas law. The Fifth Circuit assumed there was no unjust discrimination, but affirmed on the Texas law point.

SUMMARY OF ARGUMENT

The Fifth Circuit decided that the Texas Aeronautics Commission (TAC), by virtue of its regulatory power over the routes of intrastate carriers, has the authority to determine whether a federally funded airport (Love Field) must be made available for scheduled flights of an intrastate air carrier (Southwest), notwithstanding the fact that the City which owns the airport and the FAA had determined, as the product of the pervasive federal scheme for airspace management and

[7] "Certificated Air Carrier Services" is defined in the ordinance and basically includes all scheduled services of carriers certificated by the CAB or the Texas Aeronautics Commission, as well as those of foreign carriers. (App. 2151-2152).

airport planning, funding and uses, that the airport should *not* be available for scheduled air carrier flights, whether interstate or intrastate.

The Fifth Circuit's decision is incorrect because it fails to recognize that such authority in a state agency cannot, under traditional federal pre-emption principles, co-exist with the federal scheme set out in the Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.* (Aviation Act), the Airport and Airway Development Act of 1970, 49 U.S.C. § 1701, *et seq.* (AADA), and the predecessor Federal Airport Act (Airport Act), 49 U.S.C. § 1101, *et seq.* Moreover, in reaching its decision the Fifth Circuit improperly concluded that the TAC's economic regulatory power over intrastate air carriers includes authority over airports.

Under the Aviation Act, the FAA has the exclusive right and responsibility to efficiently and safely manage the nation's airspace, including the power to plan and regulate all movement of aircraft into and out of airports, and the specific power to designate and certificate the suitability of all air navigation facilities, including airports, for particular uses.

Under the AADA and the predecessor Airport Act, the FAA (independently under the Airport Act and as designate of the Secretary of Transportation under the AADA) is charged with the responsibility of developing and administering a National Airport System Plan in order to assure the availability of a nationwide system of airports capable of meeting the demands of interstate commerce, the postal service and the national defense. As a part of this responsibility, the FAA is obligated to assist airport owners in the planning of airports, including the designation of the specific aeronautical role of each airport within

the system; to make grants to airport owners (but only if the airport project is consistent with the National Airport System Plan), and to insure that each airport receiving federal funds will be available for public use on fair and reasonable terms without unjust discrimination.

The federal scheme, under the Aviation Act, the AADA and the Airport Act for airspace management and for the planning, funding and regulation of uses of public airports is pervasive and complete. While this scheme contemplates certain functions by agencies other than the FAA, including state and local agencies, and leaves to the owners of airports most of their normal proprietary rights (provided they are not exercised in an unjustly discriminatory manner), it leaves no room for state or local agencies to make *independent and conflicting* determinations as to the appropriate uses of federally funded airports, an area subject to specific and exclusive procedures under the federal law.

Such independent determinations by state agencies across the nation could result only in disruption of the national plan for a viable and balanced system of public airports necessary to meet *national* needs. The determinations of state agencies in this area would necessarily be made with the interest of the state uppermost and without the coordination necessary for the protection of national interests. The area is one in which it is peculiarly necessary that a uniform system of regulation be applied throughout the country if the purpose of Congress in providing for efficient and safe airspace management and an adequate national system of airports is to be accomplished.

In the case at bar, the Fifth Circuit's conclusion that the TAC has determined that Love Field in Dallas

must be made available for scheduled intrastate flights (and that the TAC has the authority to do so) is in direct conflict with (1) the plans developed by the FAA (and adopted by the Cities) as the product of the FAA's responsibility to develop plans for the safe and efficient utilization of the navigable airspace and (2) the Local Airport System Plan developed by the FAA, the Cities and other agencies as part of the federal planning and funding process under the Airport Act (and later the successor AADA).[8]

The error of the Fifth Circuit decision is particularly grievous because, in addition to that court's failure to recognize the effect of its decision on the federal scheme, the decision was based on a grossly incorrect conclusion of fact and upon a clearly incorrect interpretation of the law of Texas. Contrary to the conclusion of the Fifth Circuit, the TAC has never specifically determined that Southwest must serve Love Field and the Texas law clearly does not give the TAC the power to determine the availability of a city-owned airport for intrastate flights or any other use.

---

[8] In supporting the Local Airport System Plan for the use of public airports in the Dallas-Ft. Worth area, ATA does not argue or concede, of course, that the owners of airports may make determinations of the proper uses of federally funded airports which are arbitrary, unjustly discriminatory or not approved by the FAA, or that the FAA independently may make such determinations for reasons other than those specified in the applicable federal laws. In making its determinations, the FAA must act in a manner which does not discriminate unjustly among air carriers or between air carriers, on the one hand, and other segments of aviation, on the other. The plan in this case, however, is fair, not unjustly discriminatory and in compliance with all applicable federal laws.

ARGUMENT

I. The Federal Scheme for Determination of the Appropriate Uses of Public Airports Is Pervasive and Comprehensive and It Pre-Empts the Authority of State or Local Agencies To Make Independent Determinations

In *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 36 L.ed. 2d 547, 93 S.Ct. 1854 (1973) this Court began its opinion by quoting the rule of federal pre-emption as first stated by the Court in *Cooley* v. *Board of Wardens*, 12 How. 299, 13 L.ed. 996 (1851), as follows:

> "Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature: *some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port;* and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.
>
> . . . *Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.* Id., at 319, 13 L Ed 996." [emphasis added] (411 U.S. at 625)

The quotation is equally appropriate in this case, which conceptually is identical to the *Burbank* case.

In *Burbank* the question was whether the federal law with respect to noise control and airspace management was so comprehensive and pervasive as to preclude independent action by a city, under its police power, aimed at controlling aircraft noise by a curfew which precluded jet flights between 11 p.m. and 7 a.m.

The Court determined that there was pre-emption, saying:

> "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." (411 U.S. at 633)

In so ruling the Court relied not only on the detailed and comprehensive scheme set up for the control of aircraft noise under the Noise Control Act of 1972, (42 U.S.C. § 4901 *et seq.*), but also the traditional scheme of federal airspace management set out in the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* This is made clear by the following statements of the Court:

> "*The Solicitor General, though arguing against pre-emption, concedes that as respects 'airspace management' there is pre-emption. That, however, is a fatal concession*, for as the District Court found: 'The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew.'" [emphasis added] (411 U.S. at 627)
>
> * * *
>
> "*If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.*" [emphasis added] (411 U.S. at 639)

The Court then went on to summarize the FAA's 1960 decision not to impose a curfew at Los Angeles International Airport because of the adverse effect on

the air transportation system and then concluded its opinion as follows:

> "This decision, announced in 1960, remains peculiarly within the competence of the FAA, supplemented now by the input of the EPA. *We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it.*" [emphasis added] (411 U.S. at 640)

The *Burbank* case leaves no doubt then that no state or local agency may be allowed to exercise power which would in any way conflict with or impede the FAA's exclusive jurisdiction to efficiently and safely manage the navigable airspace.

In this case also the exclusive airspace management power of the FAA is seriously infringed upon by the authority found by the Fifth Circuit to be vested in the TAC. If the power of the TAC to determine the appropriate uses of federally funded airports should be upheld and a number of state agencies should use this power, control over the uses of airports would be fractionalized and the FAA's flexibility in controlling air traffic flow would be limited severely. The FAA would be unable conclusively to designate airports for the most efficient and safe use.

For example, a state agency in New York could determine that Kennedy Airport should not be used for international flights or an agency in California could determine that all flights of air carriers should use Los Angeles International Airport, to the exclusion of other area airports such as Burbank, Ontario, Long Beach and Orange County. It could be argued that under the Fifth Circuit decision the FAA would be powerless to override these determinations, even though

efficient and safe use of the airspace as determined by the FAA would require the uses prohibited by the state agency.[9] Clearly, this cannot be allowed if the FAA is to effectively exercise its exclusive power to efficiently and safely manage the airspace.

In the *Burbank* case the airspace management power was supplemented by the additional powers given the FAA under the Noise Control Act of 1972. As the Noise Control Act formed an additional and substantial basis for the finding of pre-emption in that case, the Airport Act and the AADA form substantial additional bases for a finding of pre-emption in this case. The applicable provisions of both the Aviation Act and the Airport Act, as succeeded by the AADA, are discussed briefly below.

The pertinent provisions of the Aviation Act were for the most part recognized by the Court in *Burbank* and need not be reviewed here except to point out that in addition to the powers recognized by the Court in that case, the Aviation Act specifically provides that the FAA Administrator is empowered to classify, rate and certificate air navigation facilities, including airports, as to their suitability for civil aviation uses. 49 U.S.C. § 1426.[10] While the FAA thus far has not exer-

[9] While the Fifth Circuit based its decision on the TAC's power to regulate intrastate carriers, it is possible to argue that in reaching its decision the Fifth Circuit necessarily concluded that the federal government had not pre-empted the field of airport regulation and that a state aeronautics agency could exercise control over federally funded airports, even though it did not exercise power over intrastate carriers.

[10] 49 U.S.C. § 1426 refers to "air navigation facilities." "Air navigation facility" is defined in 49 U.S.C. § 1301(8) to include "landing areas." "Airport" is defined in 49 U.S.C. § 1301(9) as a landing area regularly used for receiving or discharging passengers or cargo.

cised this power to certificate airports for specific uses, the provision itself makes clear the Congressional intent that the FAA have the authority to determine the appropriate use of all air navigation facilities, including airports, to enable it to effectively carry out its exclusive responsibility to manage the navigable airspace.

In addition the FAA's responsibilities and jurisdiction under the Aviation Act, the FAA (as delegate of the Department of Transportation) has comprehensive responsibility for development of a balanced nation-wide system of airports under the AADA, as it did under the earlier Airport Act. Under the Airport Act, the FAA was required to establish and currently revise a "national airport plan," 49 U.S.C. § 1102, and this requirement was carried forward under the AADA in which plan it is referred to as the "national airport system plan." 49 U.S.C. § 1712(a).

First the Airport Act, and then the AADA, set out a detailed and complete scheme with respect to the planning, federal funding and use of airports throughout the country in order to assure a national system of airports adequate "to meet the demands of interstate commerce, the postal service and the national defense." 49 U.S.C. § 1701. The scheme for planning, funding and use determination is revealed in the following provisions of the AADA, which are similar to those of the predecessor Airport Act:

> "The Congress hereby finds and declares—
>
> "That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.
>
> "*That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the*

postal service, and the national defense." 49 U.S.C. § 1701 (emphasis added)

* * *

"(5) 'Airport system planning' means the development for planning purposes of information and guidance to determine the extent, type, nature, location and timing of airport development needed *in a specific area to establish a viable and balanced system of public airports. It includes identification of the specific aeronautical role of each airport within the system*, development of estimates of system-wide development costs, and the conduct of such studies, surveys, and other planning actions as may be necessary to determine the short-, intermediate-, and long-range aeronautical demands required to be met *by a particular system of airports.*" 49 U.S.C. § 1711(5) (emphasis added).

* * *

"(a) *The Secretary is directed to prepare* * * * *a national airport system plan for the development of public airports in the United States.* * * *." 49 U.S.C. § 1712(a) (emphasis added)

* * *

"(c) In developing the national airport system plan, the Secretary shall to the extent feasible consult with the Civil Aeronautics Board, the Post Office Department, the Department of the Interior regarding conservation and natural resource values, and other Federal agencies, as appropriate; with planning agencies, and airport operators; and with air carriers, aircraft manufacturers, and others in the aviation industry. *The Secretary shall provide technical guidance to agencies engaged in the conduct of airport system planning and airport master planning to insure that the national airport system plan reflects the product of interstate, State, and local airport planning.*" 49 U.S.C. § 1712(c) (emphasis added)

* * *

"(a) In order to bring about, in conformity with the national airport system plan, the establishment of *a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics*, the Secretary is authorized to make grants for airport development by grant agreements with sponsors in aggregate amounts not less than the following:" 49 U.S.C. § 1714(a) (emphasis added)

* * *

"(a) * * * *No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary* under this subchapter, and all proposed development shall be in accordance with standards established by the Secretary, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, and safety of approaches." 49 U.S.C. § 1716(a) (emphasis added)

* * *

"(c)(1) All airport development projects shall be *subject to the approval of the Secretary*, which approval may be given *only if he is satisfied that*—

"(A) *the project* is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and *will contribute to the accomplishments of the purposes of this subchapter;*" 49 U.S.C. § 1716(c)(1)(A) (emphasis added)

* * *

"As a condition precedent to *his* approval of an airport development project under this subchapter, *the Secretary* shall receive assurances in writing, *satisfactory to him*, that—

"(1) *the airport* to which the project for airport development relates *will be available for*

public use on fair and reasonable terms and without unjust discrimination;" 49 U.S.C. § 1718(1) (emphasis added)

It is clear from these provisions that the federal scheme for a national system of public airports is comprehensive and exclusive. While the law calls for planning input by state and local agencies such as the TAC in order that the National Airport System Plan will reflect the product of interstate, State, and local planning, 49 U.S.C. § 1712(c), it does not allow for *independent* determinations which *conflict* with the plans coordinated and shaped by the federal government to meet the needs of the nation, as well as state and local needs. *Also, it is clear from the above provisions that the federal law contemplates local airport system plans and that particular airports within a local system may be designated for specific aeronautical uses.* 49 U.S.C. § 1711(5).

Finally, these provisions show that with respect to the appropriate uses of federally funded airports, it is the Secretary of Transportation (through the FAA) alone who has the primary jurisdiction to determine if proposed uses of an airport are appropriate as complying with the national airport system plan and that federal funds may be committed only when the Secretary is satisfied that the project (implicitly including planned uses) is in compliance with the national plan. 49 U.S.C. § 1716(a). It is also the Secretary who has the primary authority to determine if the plans for airport uses are "fair and reasonable" and "without unjust discrimination". 49 U.S.C. § 1718(1).

It is against this backdrop of federal law, that the local system plan of the FAA and the Cities must be

viewed. The essential features of the Local Airport System Plan (described above in the Statement of the Case) were insisted upon by the FAA to insure optimum efficiency and safety in the utilization of the airspace (and of available airports) and to insure that the new airport would be utilized by scheduled air carriers so that the airport would be economically self-sustaining and a worthy investment for the large amount of federal funds to be granted. The FAA recognized that without the assurance of the transfer of all scheduled airline operations to DFW, the new airport would not be fully utilized and that there would be an inefficient and uneconomic split operation.

The Regional Director of the FAA, Mr. Henry Newman, testified at the trial that "General McKee [then Administrator of the FAA] made it very clear, that we would not go ahead with the commitment to participate in this investment unless it was clearly understood that all of the air carriers were going to use this airport and we would not have a split operation . . ." (App. 942) Mr. Newman also testified that the FAA had determined that more efficient utilization of the airspace would be attained by transferring all air carrier services to DFW (App. 548); that in his opinion the FAA would impose such a requirement if the Cities did not (App. 949) and that such a transfer would maximize air safety. (App. 584-585)

That the area of airport planning and uses is preempted cannot be doubted in view of the undeniable necessity that the nationwide system of federally funded airports be subject to uniform and coordinated control. This is truly an area "imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port". See

Cooley v. *Board of Wardens, supra,* and *United States* v. *City of New Haven,* 496 F.2d 452, appeal filed *sub nom. Town of East Haven* v. *United States,* 43 U.S.L.W. 3124 (July 30, 1974), in which the Second Circuit concluded that the federal government's ability to proceed with airport development is not contingent upon the peculiarities of local law and held that a state court could not enjoin "airport operations whose regulation Congress has entirely pre-empted."

The plan of the FAA and the Cities in this case is clearly the product of the federal scheme and it must not be thwarted by incompatible determinations by the TAC. Even more important, the precedent must not be set that state agencies across the nation are empowered independently to regulate the uses of federally funded airports (and through such regulation the use of the *airspace*).

II. The Fifth Circuit Ignored the Federal Scheme and Incorrectly Based Its Decision on the Power of the TAC to Regulate Intrastate Air Carriers

The Fifth Circuit decision totally ignores the provisions of federal law discussed above and the dominant role played by the FAA in shaping the Local Airport System Plan which was adopted by the Cities and reflected in their 1968 Bond Ordinance. The court viewed the problem merely as one of the economic regulation of air carriers and as result failed to recognize that it is in fact a matter of airspace and airport regulation, a field which has been as completely pre-empted by the federal government as the matters of "flying safety" which the court acknowledged to be within the jurisdiction of the FAA.

In its decision the Fifth Circuit relied on the following quotation of the Texas Supreme Court from *Texas*

Aeronautics Commission v. *Braniff Airways, Inc.*, 454 S.W. 2d 199 (Tex. Supp. 1970):

> "In all matters of flying safety, such as the air worthiness of the aircraft and the skill of its operators, Air Southwest would be regulated by the Federal Aviation Agency. All Air Southwest aircraft and pilots would have federal certificates. However, by flying only in intrastate commerce and by not interlining with any CAB certificated carrier, making no connection for passengers or baggage, Air Southwest will not require a certificate from the federal agency in charge of economic regulations, the Civil Aeronautics Board. Congress has not pre-empted the field of the economic regulation of air carriers, and the states have the power to act so long as there is no conflict with federal law. 49 U.S.C.A. § 1301(a) and (10), and § 1371; Western Air Lines, Inc. v. California, 42 Cal.2d 621, 268 P.2d 723 (1954), cert. denied, 348 U.S. 859, 75 S.Ct. 87, 99 L.ed. 677; see Island Airlines, Inc. v. C.A.B., 331 F.2d 207 (9th Cir. 1964); Island Airlines, Inc. v. C.A.B., 363 F.2d 120 (9th Cir. 1966); Comment, 47 Texas L.Rev. 275 (1969)." (494 F.2d at 776)

Both the Texas Supreme Court and the Fifth Circuit are correct in stating that under applicable decisions it appears that the field of *economic regulation of air carriers* has not been entirely pre-empted by the federal government and that under these decisions the TAC has certain economic regulatory powers with respect to purely intrastate air carriers. The defect in the Fifth Circuit's reasoning, however, is that it fails to recognize that, as with "all matters of flying safety", all matters of airport and airspace regulation are subject to the pre-emptive federal scheme and that no power is left to state economic regulatory agencies.

It is not a matter of economic regulation of air carriers, it is a matter of airport and airspace regulation.

As both Southwest Airlines and the district court recognized with respect to the CAB, agencies vested with economic regulatory power over air carriers have no power over cities which own airports, or over airports themselves, by virtue of their regulatory power over air carriers. Southwest maintained at the trial level, and the district court held, that the CAB "has no jurisdiction over cities or their airports, as such" and that "it has jurisdiction only over 'air carriers' engaged in 'interstate commerce' ". (App. 296) The court concluded that the Board's power with respect to airports is only to direct its air carriers to serve a particular airport—assuming that it is available for such use. (In a footnote the court said, "Defendant Southwest has also contended * * * that the CAB's power to designate a single airport . . . derives not from any CAB power over the Cities . . . , but solely from the CAB's power to amend the certificates . . . of the CAB carriers.") (App. 296)

This undoubtedly is correct and the same principle applies to the TAC; while it may direct Southwest to serve any available airport by virtue of its power to amend Southwest's certificate, *its jurisdiction does not extend to determining which airports must be made available.*

Certainly nothing in the Texas Aeronautics Commission Act, Vernon's Texas Ann. Civ. St., Art. 46e-1, *et seq.*, gives the TAC any greater economic regulatory power over the intrastate carriers than the CAB has over intrastate carriers and neither the district court nor the Fifth Circuit cited any such authority. Indeed, the Fifth Circuit specifically based its decision on the

power of the TAC *implied* in its economic regulatory authority to regulate intrastate routes:

> "The power to designate 'routes' has, from times antedating any relevant to this case, been confided to that Commission. *It seems self-evident that points of origin and destination are part of every 'route,' particularly short-haul ones.*" [emphasis added] (494 F.2d at 777)

Thus the Fifth Circuit focused entirely on the economic regulatory power of the TAC and the relationship of this power to the power of the Cities. The Court was wrong as to the powers implicit in the economic regulatory function, but more importantly the Court completely ignored the fact that with respect to federally funded airports the Cities may act (and in this case actually acted) only in accordance with the federal scheme, pursuant to federal law, in an area pre-empted by the federal government.

III. The Fifth Circuit Based Its Decision Entirely on an Incorrect Factual Premise and Upon a Clearly Impermissible Interpretation of the Effect of the Certificate and Order Issued by the TAC.

The Fifth Circuit concluded, as the factual basis for its decision, that "Southwest has been certificated by the Commission into Love Field and directed to continue service there until told otherwise." *This is not correct.* Certificate No. 22 issued by the TAC to Southwest authorized service between and among the points Dallas Fort Worth, Houston and San Antonio through "any airports serving those points named herein." (App. 4366) Minute Order 22 (the order supposedly directing Southwest to continue service at Love Field "until told otherwise") *only* provided that no TAC carrier could change its point of service without ob-

taining permission from the TAC. (App. 4368) *Neither the certificate nor the order ever mentions Love Field.*

Southwest was not certificated to serve Love Field; it was certificated to serve Dallas/Fort Worth through any *available* airport.[11] And it was not directed to continue service at Love Field until told otherwise; the TAC merely directed carriers subject to its jurisdiction to seek the permission of the TAC before changing airports. Indeed, the minute order itself (set out in footnote 31 on page 52 of the Cities' Petition) shows that it had nothing to do with any determination that any carrier should serve any particular airport—the sole purpose of the order was for the TAC to keep track of the airports its carriers were serving. And it resulted from the actions of carriers other than Southwest changing airports without notice to TAC. *Southwest Airlines is not mentioned in the order and Love Field is not mentioned in the order.* The Court's factual findings as to the actions of the TAC with respect to Southwest's service to Love Field are grossly incorrect and no other conclusion reasonably can be reached.

Even if the Court's interpretation of the minute order had been correct, it is clear that the order could not have had the effect attributed to it because it did not meet the hearing requirements of the Texas statute with respect to determinations of the public convenience and necessity—and the Fifth Circuit's decision clearly assumes that Minute Order No. 22 was a de-

---

[11] Indeed, Love Field can hardly be deemed to serve "Dallas/Fort Worth" in view of its distance from Ft. Worth, whereas DFW is located between the cities.

termination of the public convenience and necessity. (See 494 F.2d at 777.)

Minute Order No. 22 itself shows that there was no notice to CAB carriers or other interested parties, that no party was afforded the opportunity to appear or present evidence and that no hearing was held, as required by the Texas law setting out the powers of the TAC. Vernon's Texas Ann. Civ. St., Art. 46c-6, Sub. 3(c). The Order obviously was not intended to be a determination of the public convenience and necessity with respect to the use of Love Field by Southwest and the court's interpretation was most clearly not permissible under the controlling state law.

Thus, the Fifth Circuit bent over backwards to avoid deciding the case on the basis of the federal law under which its jurisdiction was invoked and through a clearly improper interpretation of Southwest's certificate and the minute order found a basis for deciding the case on state law. This irrational and erroneous decision cannot be allowed to disrupt the applicable federal laws with respect to airport regulation.

CONCLUSION

In view of the above, ATA suggests that this is a case which most urgently calls for the attention of this Court and that justice demands the grant of the Cities' Petition for Writ of Certiorari.

Respectfully submitted,

/s/ GEORGE S. LAPHAM, JR.
George S. Lapham, Jr.
Attorney for the Air Transport Association of America

MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Petitioners,*

v.

SOUTHWEST AIRLINES CO. and THE TEXAS AERONAUTICS COMMISSION, *Respondents.*

OBJECTION OF SOUTHWEST AIRLINES CO. TO THE MOTION OF THE AIR TRANSPORT ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

HERBERT D. KELLEHER
Oppenheimer, Rosenburg, Kelleher & Wheatley, Inc.
Suite 620, 711 Navarro
San Antonio, Texas 78205

JOHN L. HAUER
Akin, Gump, Strauss, Hauer & Feld
2800 Republic National Bank Bldg.
Dallas, Texas 75201

Attorneys for Respondent, Southwest Airlines Co., and Members of the Bar of the Supreme Court of the United States

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Petitioners,*

v.

SOUTHWEST AIRLINES CO. and THE TEXAS AERONAUTICS COMMISSION, *Respondents.*

OBJECTION OF SOUTHWEST AIRLINES CO. TO THE MOTION OF THE AIR TRANSPORT ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(3) of the Rules of the Supreme Court of the United States, Southwest Airlines Co. (Southwest) objects to the motion of the Air Transport Association of America for leave to file brief as *amicus curiae* in support of the Petition for Writ of Certiorari. Southwest's withholding of consent and objection are based upon the following grounds:

1. Prior to consideration by the Court of the Petition for Certiorari, motions for leave to file as *amicus curiae* "are not favored." Rule 42(1).

2. Although, quite obviously, neither the facts nor the applicable law support the Petition for Certiorari

and there are no special or important reasons for granting such Petition, it is astounding that the Air Transport Association of America would contend that the former Solicitor General of the United States and the law firm of Reavis, Pogue, Neal & Rose, which formerly represented Eastern Airlines, now represents Pan American World Airways, frequently jointly represents the major trunk carriers before the Civil Aeronautics Board (CAB), and one of whose senior partners is a former General Counsel and Chairman of the CAB, are incapable of presenting adequately to this Court, in the best light possible even under the exceedingly unfavorable circumstances present here, the facts and questions of law relevant to disposition of the Petition for Certiorari. Rule 42(3). In fact, the Air Transport Association of America has failed to demonstrate the existence of any facts or questions of law relevant to this controversy which have not been adequately presented to this Court by the parties, and the ATA's proposed brief is merely a paraphrase of the Petition for Certiorari, presenting the same facts and arguments urged by Petitioners. The sole purpose of the motion for leave to file and accompanying brief is to seek to influence this Court to believe that this case is of moment to the entire American airline industry when, in fact, as set forth below, its only significance relates to the private pocketbook interests of a few powerful members of the ATA in suppressing, at the expense of the traveling public, effective, lower fare, commuter airline competition from the non-CAB, non-ATA club member, Southwest Airlines Co., a small intrastate air carrier with a total fleet of four aircraft. Does the ATA really believe that Mr. Griswold and Reavis, Pogue, Neal & Rose are unable to put the best face possible upon the facts and law?

3. The eight CAB air carriers serving Dallas/Fort Worth have jointly agreed to underwrite any deficits resulting from the construction and operation of the new Dallas-Fort Worth Regional Airport (DFW), which they also, in effect, jointly agreed to construct and operate as "partners" of the Cities in order to relieve themselves of the uneconomic burden of serving two airports, only twelve air miles apart, with jet aircraft. These carriers include Delta and American which, no doubt unhampered by the belated participation of Pan American's law firm in this case, have influenced their own trade association, the ATA, to attempt to intervene prematurely in order to prejudice the outcome on the Petition. The ATA's attempt to file as *amicus* represents nothing more than "back scratching" among its members, and it is completely unable to explain why this case, involving merely a backyard quarrel among Texas cities, a Texas regulatory agency, and a tiny, Texas intrastate airline, has significant national, jurisprudential implications. Neither the Federal Aviation Administration (FAA) nor the Department of Transportation (DOT) has seen fit to intervene at any stage of these proceedings, which, to their knowledge, have been in progress since the complaint was filed in June of 1972. Apparently, the ATA intends to act as a private solicitor and attorney general in purportedly championing the non-existent powers of a Federal agency, the FAA, which has never seen fit to champion its own powers in this regard, simply because they are non-existent. The ATA's motion reveals no reason why any segment of the public or any Federal agency will now, or hereafter, be affected by this litigation and, more specifically, by denial of the Petition for Certiorari.

4. The CAB air carriers serving Dallas and Fort Worth signed contracts to transfer all of their "Certificated Air Carrier Services" to their own airport, DFW, upon its opening. Southwest did not sign such a contract. American and Delta are now suing Braniff, Dallas, Fort Worth, and, indirectly, Texas International in the Federal District Court for the Northern District of Texas in an attempt to prove that these contracts intended, and contemplated, that all of the services of the CAB air carriers, intrastate as well as interstate, should be transferred to DFW. These are wholly separate proceedings involving contractual obligations not undertaken by Southwest and are the only proceedings in which the ATA, or, more properly, some of its most powerful members, have any legitimate interest. A decision favorable to Delta and American in such proceedings would completely resolve any problems of the ATA, and its concerned members, and the issues involved in that lawsuit were not before the trial court in the instant case. The proper place for their resolution is at the trial level where the ATA, if it so chooses, and certainly its members, will be before the Court as parties.

5. The ATA has known of the instant case, and of any interest it may have, for more than two years, or at least since inception of the litigation. However, the ATA took no action to intervene as a party or *amicus curiae* until after the case had been decided by the United States Court of Appeals for the Fifth Circuit and the Petitioners had filed their Petition for a Writ of Certiorari. The only possible result of granting the motion for leave to file herein will be to delay disposition of the Petition for Certiorari, which Respondents will, in any event, conclusively demonstrate should be denied.

WHEREFORE, for each and all of the foregoing reasons, Southwest respectfully submits that the Motion of Air Transport Association of America for leave to file a brief as *amicus curiae* should be denied and that all copies of the proposed brief should be returned to the ATA.

Respectfully submitted,

/s/ HERBERT D. KELLEHER
Herbert D. Kelleher
Oppenheimer, Rosenberg, Kelleher & Wheatley, Inc.
Suite 620, 711 Navarro
San Antonio, Texas 78205

/s/ JOHN L. HAUER
John L. Hauer
Akin, Gump, Strauss, Hauer & Feld
2800 Republic National Bank Bldg.
Dallas, Texas 75201

Attorneys for Respondent, Southwest Airlines Co., and Members of the Bar of the Supreme Court of the United States

Certificate of Service

The undersigned member of the Bar of the Supreme Court of the United States hereby certifies that he has this 2nd day of November, 1974, served copies of this document upon the following counsel at the addresses set out below by depositing same in the United States Mail, postage prepaid, return receipt requested:

Mr. N. Alex Bickley
City Attorney
501 City Hall
Dallas, Texas 75201

Mr. S. G. Johndroe, Jr.
City Attorney
City of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

Mr. Lee E. Holt
Legal Counsel
Dallas-Fort Worth Regional Airport Board
P. O. Drawer DFW
Dallas-Fort Worth Airport, Texas 75261

Mr. Rex H. White, Jr.
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711

Mr. Erwin N. Griswold
Mr. James M. Burger
Reavis, Pogue, Neal and Rose
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. Charles S. Rhyne
Mr. Courts Oulahan
Mr. Alfred J. Tighe, Jr.
Mr. David M. Dixon
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Mr. George S. Lapham, Jr.
Air Transport Association of America
1709 New York Avenue, N.W.
Washington, D.C. 20006

/s/ HERBERT D. KELLEHER
Herbert D. Kelleher

LIBRARY
SUPREME COURT, U. S.
FILED
NOV 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Petitioners,*

v.

SOUTHWEST AIRLINES CO. AND THE TEXAS AERONAUTICS COMMISSION, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE OF THE AIR TRANSPORT ASSOCIATION OF AMERICA TO THE OBJECTION OF SOUTHWEST AIRLINES CO.

GEORGE S. LAPHAM, JR.
JEROME F. HUISENTRUIT
Air Transport Association
of America
1709 New York Avenue, N.W.
Washington, D. C. 20006
Attorneys for the Air Transport Association of America

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Petitioners,*

v.

SOUTHWEST AIRLINES CO. AND THE TEXAS AERONAUTICS COMMISSION, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONSE OF THE AIR TRANSPORT ASSOCIATION OF AMERICA TO THE OBJECTION OF SOUTHWEST AIRLINES CO.

The Air Transport Association of America (ATA) hereby responds to the Objection of Southwest Airlines Co. (Southwest) to ATA's Motion for leave to file brief as *amicus curiae.*

1. Southwest does not show, except by conclusory statement, that the matters set forth in ATA's brief are a mere paraphrase of the Petition for Writ of Certiorari filed by the Cities of Dallas and Fort Worth and the Dallas-Fort Worth Regional Airport Board. Examination of the brief will demonstrate that this assertion is without merit.

2. ATA recognizes that the Court will weigh the ATA Motion on traditional legal bases and will not be swayed by Southwest's postulations as to motivations, imagined cabals, or the identity and competence of attorneys representing the petitioners, whose interests are by definition not identical to those of ATA.

3. ATA continues to rely on the reasons set forth in its initial filing as a sound basis for grant of the ATA Motion.

Respectfully submitted

/s/ George S. Lapham, Jr.
George S. Lapham, Jr.
Attorney for the Air Transport Association of America

/s/ Jerome F. Huisentruit
Jerome F. Huisentruit
Attorney for the Air Transport Association of America

Supreme Court, U. S.
FILED
NOV 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

* * *

NO. 74-324

* * *

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD
Petitioners

V.

SOUTHWEST AIRLINES CO. and TEXAS AERONAUTICS COMMISSION,
Respondents

* * *

BRIEF OF RESPONDENT, TEXAS AERONAUTICS COMMISSION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

REX H. WHITE
Assistant Attorney General

Attorneys for Respondents
P. O. Box 12548
Austin, Texas 78711

TABLE OF CONTENTS

Page

Index of Authorities ii

Question Presented 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

The Writ Should be Denied for the Following Reasons 11

Conclusion 20

Certificate of Service 21

INDEX OF AUTHORITIES

Cases Cited	Page
Alpha Petroleum Co. v. Terrell, 122 Tex. 257, 59 S.W.2d 364, 367 (1933).	19
Braniff Airways, Inc. v. CAB, 473 F.2d 1150 (D.C. Cir. 1972).	6, 7, 13
City of Arlington v. Lillard, 116 Tex. 446, 294 S.W. 829 (1927)	12
City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624	17, 18
City of Dallas v. CAB, 221 F.2d 501 (D.C. Cir. 1954), cert.denied 348 U.S. 914 (1955)	13
City of Fort Worth v. Lillard, 116 Tex. 509, 294 S.W. 831 (1927).	12
City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958)	18
Florida Avocado Growers v. Paul, 373 U.S. 132, 142 (1963)	14
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960)	17
Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 230 (1947)	17
Siler v. Louisville and Nashville Railway Co., 213 U.S. 175 (1909).	12
State of Washington Dept. of Game v. F.P.C., 207 F.2d 391 (9th Cir. 1953), cert. denied 347 U.S. 936 (1954)	19

Texas Aeronautics Commission, et al v. Braniff Airways, Inc., 454 S.W.2d 199 (Tex.Sup. 1970), cert. denied 400 U.S. 943 (1970). 5, 7

United States v. City of New Haven, 496 F.2d 452 (2nd Cir. 1974), cert. denied 43 U.S. Law Week 3247 (1974). 18

Federal Statutes Cited

Noise Control Act of 1972, 42 U.S.C. Art. 4901, et seq. 17

Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301, et seq. 49 U.S.C. Sec. 1371, et seq. 6, 7, 13, 18

Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1701, et seq. 3, 11, 13, 15, 18
49 U.S.C. Sec. 1714(a) 14
49 U.S.C. Sec. 1714(a)(1) and (2). 14
49 U.S.C. Sec. 1716(b) 15
49 U.S.C. Sec. 1716(c)(1)(D) and(E) . . . 15

Texas Constitution Cited

Article XI, Section 5 . . . . . 2, 12

Texas Statutes Cited

Texas Aeronautics Act, Article 46c-1, et seq., Vernon's Tex.Civ.Stat. 2, 4
Article 46c-1(3)(a), Vernon's Tex. Civ.Stat. 4
Article 46c-6(3)(e), Vernon's Tex. Civ.Stat. 19

Texas Municipal Airports Act, Article 46d-1, et seq., Vernon's Tex.Civ.Stat. 3, 9
Article 46d-7(b), Vernon's Tex. Civ.Stat. 12

Miscellaneous Cited

1968 Concurrent Bond Ordinance 9
Section 9.5 . . . . . 9, 11, 12, 16
Texas Aeronautics Commission Minute Order No. 22 . . . . . 4, 13, 19
U.S. Code Congressional and Administrative News, 1970, p. 3047. 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS,
THE CITY OF FORT WORTH, TEXAS,
AND THE DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD,
Petitioners,

V.

SOUTHWEST AIRLINES CO. and
TEXAS AERONAUTICS COMMISSION,
Respondents.

BRIEF OF RESPONDENT, TEXAS AERONAUTICS COMMISSION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

This case involves the application of settled Texas law to ascertain the authority of a municipality to exclude state-certificated and authorized air carriers of intrastate passengers from a municipally-owned public airport. There are no special and important reasons necessitating review by this Court on Petition for Writ of Certiorari.

Rather than the sweeping questions of preemption and national policy presented by Petitioners, the determinative question is whether a Home Rule City in Texas, acting individually and through a Regional Airport Board created jointly with an adjacent Home Rule City, may exclude from its municipally-owned public airport an air carrier certificated by the State to conduct and required to maintain its intrastate air carrier passenger services at that municipally-owned public airport. The United States District Court for the Northern District of Texas, followed by the United States Court of Appeals for the Fifth Circuit, has correctly resolved the question against the Petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article XI, Section 5, Texas Constitution:

> "Sec. 5. Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; . . ."

2. Texas Aeronautics Act, Article 46c-1, et seq., Vernon's Tex.Civ.Stat. (Appendix E to Peti-

tion, pp. 1e-16e).

3. Texas Municipal Airports Act, Article 46d-1, et seq., Vernon's Tex.Civ.Stat. (Appendix D to Petition, pp. 1d-15d).

4. Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1701, et. seq. (Appendix H to Petition, pp. 1h-11h).

STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate and incomplete necessitating a restatement here by the Respondent to focus on those facts material to a consideration of the question presented. The factual context set forth by the United States Court of Appeals for the Fifth Circuit in its opinion (Appendix A to the Petition, pp. 1a-2a) substantially states the necessary elements forming the basis of that Court's decision. Presentation of supplementary facts material to the question presented will highlight the correctness of the Fifth Circuit decision.

The participants in this controversy, some of which have not been officially before the Courts below, are (1) the Texas Aeronautics Commission, (2) Southwest Airlines Co., (3) the Civil Aeronautics Board, (4) eight Civil Aeronautics Board-certificated air carriers, (5) the Cities of Dallas and Fort Worth, Texas, including their jointly created Dallas-Fort Worth Regional Airport Board, (6) the Federal Aviation Administration, and (7) the focal point of the controversy, Love Field, situated within

the limits of Dallas, Texas. Each of these participants is productive of certain factual elements, hereinafter set out, essential to establish the correct background upon which this case has been decided. There are of necessity some duplicative factual elements common to more than one of the enumerated participants.

(1) The Texas Aeronautics Commission (hereinafter "TAC"), pursuant to the authority granted to that agency in Article 46c-1, et seq., Vernon's Tex.Civ.Stat., issued a certificate of public convenience and necessity to Southwest Airlines Co. (hereinafter "Southwest") authorizing that air carrier to conduct its proposed air carrier passenger services between the terminal points of Dallas-Fort Worth and Houston, Dallas-Fort Worth and San Antonio, and Houston and San Antonio, and to the extent relevant here, authorized that air carrier to serve "any airport" in the Dallas-Fort Worth area. (R. 4366). Subsequent to that authorization, the TAC promulgated, pursuant to its authority in Article 46c-1, Subdivision 3(a), Vernon's Tex.Civ.Stat., a regulatory measure entitled "Minute Order No. 22". (R. 4368, 4369). That regulation of general application to all air carriers within the scope of the agency's jurisdiction instructed the air carriers that a carrier could not discontinue all air service to any airport through which such carrier presently provided air service without prior approval from the agency. To date the TAC has neither granted nor been asked to grant such approval for Southwest to terminate its certificated services at Dallas-Love Field.

(2) Southwest is the owner of a certificate of public convenience and necessity issued by the TAC providing that they may conduct their intrastate air carrier passenger services between the terminal points of Dallas-Fort Worth and Houston, Dallas-Fort Worth and San Antonio, and Houston and San Antonio, and to the extent relevant, provide such services through "any airport" in the Dallas-Fort Worth area. Southwest began flying immediately subsequent to the final determination in Texas Aeronautics Commission, et al v. Braniff Airway, Inc., 454 S.W.2d 199 (Tex.Sup. 1970), cert. denied 400 U.S. 943 (1970). Their services commenced between Love Field and two of the three terminal points authorized by their certificate authority. (R. 1279). Southwest has refused to sign a letter agreement with the Dallas-Forth Worth Regional Airport Board, the tenor of which letter agreement appears to require the signatory air carrier (Southwest) to move all of its air carrier services from Dallas-Love Field to the Dallas-Fort Worth Regional Airport upon the opening of the latter and requires the assumption of a certain financial obligation with respect to the revenue bonds outstanding against the Dallas-Fort Worth Regional Airport. (For example, see R. 3703-3706).

(3) The Civil Aeronautics Board (hereinafter "CAB") initiated an investigation in 1962 known as the Dallas-Fort Worth Regional Airport Investigation. (R. 1970-1974). The stated purpose of the investigation was to determine the necessity for amendment of the certificates of public convenience and necessity of the existing air carriers certificated by the CAB to serve both Dallas and Fort Worth

so as to require that all services conducted pursuant to those certificates be through a single airport. The CAB stated in a preliminary order issued subsequent to the hearing that it was of the opinion that all air carrier services should be conducted through a single airport. (R. 1979). This investigation was terminated in September, 1973, without the certificates of public convenience and necessity issued to the eight air carriers certificated by the CAB to serve the Dallas-Fort Worth area being amended.

The CAB has taken the position, at the instance of a complaint filed before the CAB by Braniff Airways, Inc. and Texas International Airlines, Inc., that it does not have, under the Federal Aviation Act of 1958, any measure of economic regulatory jurisdiction over the completely intrastate operations of Southwest. The position of the CAB was forcefully sustained by the D. C. Circuit in Braniff Airways, Inc. v. CAB, 473 F.2d 1150 (D.C. Cir. 1972). It is also noteworthy that the CAB has not intervened in this matter nor filed a statement of position as an amicus.

On its face, the order of the CAB dictating single airport service to the Dallas-Fort Worth area forcefully demonstrates that the preliminary decision of the CAB was based on considerations of public convenience and necessity rather than upon considerations dictated by the FAA, such as air space management, airport safety or airport control. (R. 1979).

(4) CAB Carriers. There are eight (8) carriers certificated by the CAB pursuant to the

FAA Act of 1958, 49 U.S.C. Sec. 1371, et. seq., to serve the Dallas-Fort Worth area. They are: Braniff Airways, United Air Lines, Delta Air Lines, American Airlines, Ozark Airlines, Frontier Airlines, Continental Air Lines, and Texas International Airlines. None are visible parties or intervenors in this matter. Three, namely, Braniff, Texas International and Continental, very forcefully contested before the Texas courts the grant of certificate authority by the TAC to Southwest to begin the operation in controversy here. Two, Braniff and Texas International, pursued the matter to this Court in Texas Aeronautics Commission, et al v. Braniff Airways, Inc., supra. The latter two carriers petitioned the CAB to have that agency exercise its jurisdiction over the operation of Southwest. That petition, as previously noted, was refused by the CAB, such action being subsequently sustained in Braniff Airways, Inc. v. CAB, supra.

These eight CAB-certificated carriers signed letter agreements with the Dallas-Fort Worth Regional Airport Board and the Cities (R. 3691, 3703, 3715, 3727, 3739, 3751, 3763, 3775), the tenor of which appears to be that each agreed to move all of its air carrier services to Dallas-Fort Worth Regional Airport upon its opening and to provide fees necessary to meet the debt service requirement on a certain portion of the revenue bonds. One of these CAB-certificated carriers, Braniff, retained limited air carrier services at Love Field after the opening of the Dallas-Fort Worth Regional Airport but has subsequently moved those remaining services to the D-FW Regional Airport. On the contrary, another CAB-certificated

carrier, Texas International, moved all of its air carrier services from Love Field to D-FW Regional Airport upon the opening of the latter, but subsequently returned a portion of its services to Love Field. (Opinion of the Fifth Circuit, Appendix A to Petition, p. 2a). The latter-mentioned activities are the subject of a lawsuit filed in the United States District Court for the Northern District of Texas by two of the CAB-certificated carriers, namely, Delta and American, against Braniff Airways and the Cities of Dallas and Fort Worth, Cause No. CA-4-74-84. That suit seeks to construe, among other things, the meaning and intent of the letter agreements.

Lastly, petitions for reconsideration have been filed with the CAB as a response to the final order of the CAB terminating the D-FW Regional Airport Investigation. The following CAB air carriers are supporting the action by the CAB terminating the investigation without amending the certificates of the carriers involved: Braniff, Texas International. Delta, American, Continental and the Petitioners have filed petitions for reconsideration complaining of the termination of the Dallas-Fort Worth Regional Airport Investigation without amending the certificates of the respective CAB-certificated air carriers. The petitions have not been acted upon by the CAB.

(5) The Cities of Dallas and Fort Worth, Texas, and their jointly-created Dallas-Fort Worth Regional Airport Board.

The City of Dallas (hereinafter "Dallas") is

the owner and operator of Love Field and has been at all times relevant to this controversy. Dallas exercises full control to the extent permissible over that airport with the noted exception that some degree of its governmental function appears to have been relinquished to the Dallas-Fort Worth Regional Airport Board pursuant to the waiver provisions contained in the 1968 Bond Ordinance. (R. 2195). Dallas, of course, has been the recipient of numerous types of federal grants for the benefit of Love Field. (R. 304, 4859, 4874, 4886). There are several outstanding bond issues containing covenants stating generally that Love Field will remain open for all airport uses. (R. 321, 322). Dallas has consistently maintained during the course of this controversy that it has no intention or desire to close Love Field as an airport. This position has been restated as recently as October 21, 1974, in a resolution adopted by the City Council of Dallas (Appendix A attached hereto).

Dallas and Fort Worth together have created the Dallas-Fort Worth Regional Airport Board pursuant to the authority contained therefor in Article 46d-1, et seq., Vernon's Tex.Civ.Stat. Collectively these two cities, along with the Dallas-Fort Worth Regional Airport Board, have been the recipients of federal moneys granted by the FAA for the construction of the Dallas-Fort Worth Regional Airport. (R. 567). The Cities have collectively adopted joint bond ordinances (R. 2040, 2268, 2643, 2889, 3142, 3429) and issued bonds thereon. These ordinances contain, among other items critical here, the definitions of "CERTIFICATED AIR CARRIER SERVICES" (R. 2151); Section 9.5 which pro-

vides for phase-out of Love Field to the extent "legally permissible" (R. 2195); and the waiver provisions permitting the Board, under certain conditions, to grant a waiver from the phase-out provisions heretofore referenced (R. 2195).

Lastly, of course, the two Cities, along with the Dallas-Fort Worth Regional Airport Board, filed the petition for declaratory judgment which is the beginning phase of this matter, seeking a declaration that Southwest may be excluded from Dallas-Love Field because the whole field of air carrier services was pre-empted by the CAB by its orders issued in the Dallas-Fort Worth Regional Airport Investigation, and further, that the Cities were not prohibited by any federal or state law from requiring that Southwest move from Dallas-Love Field to the new D-FW Regional Airport. (R. 222, 223).

(6) The Federal Aviation Administration (hereinafter "FAA") participated in the CAB proceedings heretofore mentioned, the Dallas-Fort Worth Regional Airport Investigation. The FAA has required that Greater Southwest International Airport (GSIA) be closed upon the opening of the new Dallas-Fort Worth Regional Airport for the reason that the geographical position of GSIA places it within the traffic patterns of the new airport, thus posing a safety hazard (see footnote 1, Petition, page 6), but it is noteworthy that the FAA has not required that Dallas-Love Field be closed for any reasons to any aircraft upon the opening of D-FW Regional Airport. Safety is not a consideration at Dallas-Love Field. (R. 589). The FAA, as previously noted, granted money to the Dallas-Fort Worth Region-

al Airport Board pursuant to the terms, conditions and authority contained in the Airport and Airway Development Act of 1970. 49 U.S.C. Sec. 1701, et seq. The FAA has not, to the extent determined by any party to this matter, issued a regulation or directive excluding any intrastate carrier, including Southwest, from conducting its operations in and out of Dallas-Love Field. Although a representative of the FAA testified in the District Court below, Respondent especially points out that the FAA has not intervened in this matter despite the prognostication by the Petitioners that certain grave consequences will befall the FAA and its programs if the opinion of the Fifth Circuit stands.

(7) The last and most sedentary participant in this proceeding is Dallas-Love Field itself. As previously noted, it is owned and operated by the City of Dallas except to the extent that the City appears to have relinquished some degree of its governmental function to the D-FW Regional Airport Board pursuant to the waiver provision contained in the 1968 Concurrent Bond Ordinance. (R. 2195). Dallas-Love Field has been the recipient of various federal grants. (R. 304, 4859, 4874, 4886). There are outstanding public bonds containing covenants essentially requiring that Dallas-Love Field remain open for all aviation use. (R. 321, 322). It has been a public airport in excess of thirty years with air carrier passenger services provided for most of that time.

THE WRIT SHOULD BE DENIED FOR THE FOLLOWING REASONS

1. The United States Court of Appeals for

the Fifth Circuit had a right to decide and did correctly decide the questions in this case pursuant to principles of established state law even though the Circuit Court properly had federal question jurisdiction and did not decide the case expressly on that basis. Siler v. Louisville and Nashville Railway Co., 213 U.S. 175 (1909). This matter in its proper focus presents the threshold question of the authority of a Home Rule City to exclude from its public airport a state-created and authorized intrastate air carrier passenger service. It is to the distribution of authority as between the municipality and the State that the opinion of the Court is addressed, recognizing the validity and applicability of City of Arlington v. Lillard, 116 Tex. 446, 294 S.W. 829 (1927), and City of Fort Worth v. Lillard, 116 Tex. 509, 294 S.W. 831 (1927) as determinative. The basic factual analogy between these cases and the instant case was held by the Court to be close and valid (Appendix A to Petition, p. 4a), dictating that a municipality cannot prohibit that which the State has authorized.

The provisions of Article XI, Section 5 of the Texas Constitution and Article 46d-7(b), Vernon's Tex.Civ.Stat. (Appendix D to Petition, p. 6d), clearly proscribe the passage of an ordinance by a municipality that is in conflict with state law and regulations promulgated pursuant thereto. The so-called phase-out provisions of the 1968 Bond Ordinance, Section, 9.5 as urged by the Petitioners, requires the removal from Dallas-Love Field and the exclusion therefrom of the state-certificated air carrier passenger services provided by Respondent Southwest. Those services cannot be unilaterally

removed by Southwest without the prior consent and approval of the Texas Aeronautics Commission (TAC Minute Order 22). That consent has been neither sought nor granted. The opinion of the Court correctly noted that, "The cities' road to relief passes by the Texas Aeronautics Commission." (Appendix A to Petition, page 7a).

In this context, the Petitioners would ascribe to Congress, pursuant to the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301, et seq., and the Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1701, et seq., the clear intent to preempt the relationship between a state and its municipalities. The CAB, pursuant to the Federal Aviation Act of 1958, certainly does not possess the authority to control airport designation insofar as it relates to the airport a purely intrastate certificated air carrier may serve. Braniff Airways, Inc. v. Civil Aeronautics Board, supra. The TAC performs that function, while the CAB performs that function with respect to CAB-certificated air carriers. City of Dallas v. CAB, 221 F.2d 501 (D.C.Cir. 1954), cert. denied 348 U.S. 914 (1955).

The Airport and Airway Development Act (hereinafter "Act") upon which Petitioners place great emphasis in postulating complete federal pre-emption of the subject matter of this case, as well as total frustration of important federal policies of overriding national significance, is not in point. Petitioners imply that the Act and a master planning document prepared by Petitioners to satisfy provisions of that Act confer upon the City of Dallas the power to exclude scheduled operations

of Southwest from Love Field. Nothing in the Act either expressly or impliedly grants the authority to Petitioner to exercise control over an intrastate-certificated air carrier to the extent that the Petitioner, pursuant thereto, may exclude that air carrier from a public airport. Such is not the plain intent, effect or purpose of the Act. Florida Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

The District Court observed the purpose of the Act is to provide for the planning and construction of airports; it does not empower a municipal airport authority or regional planning agency to determine the routes of certificated air carriers (R. 41, Memorandum Opinion, p. 14, Appendix p. 301); U.S. Code Congressional and Administrative News, 1970, p. 3047. Petitioners, however, ask this Court to read into 49 U.S.C. Sec. 1714(a) language authorizing municipalities to prohibit certain air carrier operations at their airports as they may see fit. The provisions on which they apparently rely empower the Secretary of Transportation to make grants for the development of airports, "the primary purpose of which is to serve general aviation and to relieve congestion at airports having a high density of traffic serving other segments of aviation", and for the development of airports "serving segments of aviation other than air carriers certificated by the Civil Aeronautics Board . . . ". 49 U.S.C. Sec. 1714(a)(1) and (2). This language does not bestow upon a municipality the authority to exclude a state-regulated carrier from any airport, even one "the primary purpose of which is to serve general aviation. . . ". It does empower the Secretary of Transportation to make

grants of federal moneys for the construction of new airports. Moreover, the authority of a municipality to construct new airports is not at issue; the only question here is whether it may exclude an airline from an existing facility which has been constructed and improved with assurances that it would remain open to scheduled air carrier operations. (R. 41, Memorandum Opinion, p.1, Appendix p. 288; and pp. 33-35, Appendix pp. 320-322).

The position of the Court is enforced by reference to the declaration of congressional policy contained in Sec. 1701 of the Act (Appendix H to Petition, p. 1h). It states:

> "That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense." (Emphasis added.)

The thrust of the Act is clearly addressed to considerations of ". . .interstate commerce. . ." and not intrastate regulation of intrastate air carriers subject only to the jurisdiction of the state where their services are performed. Furthermore, Sec. 1716(b) (Appendix H to Petition, page 6h) and (c)(1)(D) and (E) basically provide that (1) nothing in the Act will authorize a municipality to submit a project grant application where state law prohibits the municipality from making an application and (2) the municipality must have the legal authority to engage in the development as proposed. It would appear that the collective import of the referenced

provisions would negative any concept that Congress, by the Act, intended to pre-empt the ability of the state to designate routes of intrastate air carriers and regulations related thereto.

Respondent would also point out that to pursue Petitioners' theory of pre-emption would mean that the Petitioners also provided for themselves a contractual mechanism by which they could waive or override that federal pre-emption. Section 9.5 of the 1968 Bond Ordinance (R. 2195) provides that the D-FW Regional Airport Board may grant a waiver of the so-called phase-out of Love Field; thus, the applicability of federal pre-emption is at the discretion of the Petitioners. Respondent respectfully urges that pre-emption is not a valid issue.

Nor can Respondent perceive any viable reason sustaining the proposition that the opinion of the Court will result in frustration of a national policy of considerable importance. There are no inherent factors in the national airport system plan, whatever the scope of it may be, that indicate, dictate, suggest or require that an intrastate certificated air carrier (Southwest) be excluded from utilizing Dallas-Love Field so long as that field remains open. The only entity here seeking to exclude or attempting to require the exclusion of Southwest from Love Field is the City itself. It is not the FAA or the CAB. One cannot find within the framework of any of the federal acts involved here language of an exclusionary nature prohibiting or requiring the prohibition of Southwest from Dallas-Love Field.

The only evidence cited by Petitioners suggesting their theory that the opinion of the Fifth Circuit frustrates national policy is to be found in the Petition itself (pages 13, 14, and footnotes 9, 10). Suffice it to point out that the actions described therein of the CAB-certificated air carriers and of the Petitioners are not the result of or done in furtherance of any state action, policy, statute or regulation. They are the individual acts of those parties taken pursuant to their own decisions. Whatever rights, obligations and liability may result therefrom are wholly outside the issues in this matter.

The formulation of great questions of pre-emption and frustration of federal policies are but mere ghosts tendered by Petitioners to disguise the threshold question at issue in this case. The Court should not find federal pre-emption of state law unless that is the "clear and manifest purpose of Congress". Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 230 (1947). To repeat, there is no conflict between the federal programs involved here and the state laws determinative of the issue in this case. The question of pre-emption does not arise. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960).

2. The opinion of the Fifth Circuit is not in conflict with the opinion of the Court in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624. At issue there was the promulgation of local noise ordinances in direct conflict with an FAA regulatory authority granted by the Noise Control Act of 1972, 42 U.S.C. Article 4901, et seq., 1973. For

the City of Burbank v. Lockheed Air Terminal to be controlling, this Court would have to find within the context of the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958 and/or a regulation issued thereunder by the FAA pursuant thereto, a clear conflict between the federal law and some state act or regulation. Respondent strongly urges that no such conflict exists.

3. United States v. City of New Haven, 496 F.2d 452 (2d Cir. 1974), cert. denied 43 U.S. Law Week 3247 (1974), does not support the position of Petitioners that there is a conflict with the opinion of the Second Circuit. The case is distinguishable on the grounds that the State of Connecticut was seeking to enjoin the use of the national air space as it relates to an approach to a segment of an existing runway. To the contrary, we have here that the City of Dallas intends to keep Love Field open, a condition most acceptable to Respondent. The TAC urges only that one of its certificated air carriers is authorized to continue to serve that public airport so long as it does remain open. There is here no exercise of state power in conflict with or to the detriment of any federal program or policy.

4. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958), is clearly distinguishable and inappropriate to support Petitioners. There a city acquired the power of federal condemnation pursuant to 16 U.S.C. Sec. 814 (1970) as a licensee and agency operator of a federal hydro-electric dam project on navigable waters. The State sought to enjoin the city's condemnation of state land, a power not residing in the city under state law. In a prior

related case challenging the issuance of the license to the City of Tacoma, because the license provisions conflicted with State law, the Ninth Circuit upheld the grant of the license. The Court saw total frustration of the authorized federal project if the position of the State were determinative. State of Washington Dept. of Game v. F.P.C., 207 F.2d 391 (9th Cir. 1953),cert. denied 347 U.S. 936 (1954). The Supreme Court in the case cited by Petitioners held that the State's action to obtain an injunction was an invalid collateral attack on the Ninth Circuit's decision. Respondent does not believe that the City of Dallas maintains that it is a federal licensee to operate Dallas-Love Field as a federal project. Additionally, investiture of the power of condemnation in a municipality on behalf of the Federal Government in furtherance of a federal project is not at issue in this matter.

5. Petitioners seek to raise a due process question with reference to the promulgation of TAC Minute Order No. 22. Their assertions are inappropriate and insupportable. Furthermore, Petitioners have not sought to have their complaint, if any, reviewed in the manner provided by the Legislature of Texas for judicial review of actions of the Respondent TAC. Article 46c-6, Subdivision 3(e), Vernon's Tex.Civ.Stat. Petitioners' action is an unauthorized collateral attack under the laws of the State of Texas. Alpha Petroleum Co. v. Terrell, 122 Tex. 257, 59 S.W.2d 364, 367 (1933).

In summary, the reasoning and authorities cited by Petitioners do not support the position taken.

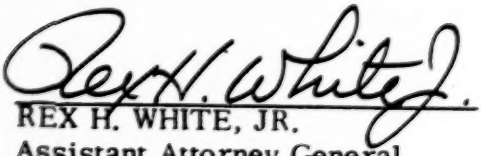
CONCLUSION

The opinion of the United States Court of Appeals for the Fifth Circuit resolves the conflict between the State of Texas and one of its municipalities upon principles of settled state law. The relationship between the State and its municipalities has not been pre-empted by the respective federal statutes urged by Petitioners herein, nor does the opinion result in the furtherance of a state action disruptive of national policies of great importance. For the reasons stated herein, Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General



REX H. WHITE, JR.
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Respondent
Texas Aeronautics Commission

CERTIFICATE OF SERVICE

I, Rex H. White, Jr., one of the attorneys for Respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of November, 1974, I served three (3) copies of the foregoing document, in duly addressed envelopes, with airmail postage prepaid, as required by Rule 33 (1) of this Court, upon each of the following parties: N. Alex Bickley, City Attorney, City of Dallas, Texas, 501 City Hall, Dallas, Texas 75201; S. G. Johndroe, Jr., City Attorney, City of Fort Worth, Texas, 1000 Throckmorton Street, Fort Worth, Texas 76102; Lee E. Holt, Legal Counsel, Dallas-Fort Worth Regional Airport Board, P. O. Drawer DFW, Dallas-Fort Worth Airport, Texas 75261; Herbert D. Kelleher, Oppenheimer, Rosenberg, Kelleher & Wheatley, Inc., Suite 620, 711 Navarro, San Antonio, Texas 78205; Erwin N. Griswold, James M. Burger, Reavis, Pogue, Neal and Rose, 1100 Connecticut Avenue, N.W., Washington, D.C. 20036; Charles S. Rhyne, Courts Oulahan, Alfred J. Tighe, Jr., David M. Dixon, Rhyne & Rhyne, 400 Hill Building, 839 Seventeenth Street, N.W., Washington, D.C. 20006; George S. Lapham, Jr., Air Transport Association of America, 1709 New York Avenue, N.W., Washington, D.C. 20006; John L. Hauer, Akin, Gump, Strauss, Hauer & Feld, 2800 Republic National Bank Building, Dallas, Texas 75201.

Rex H. White, Jr.

REX H. WHITE, JR.
Assistant Attorney General

COUNCIL CHAMBER

October 21, 1974

74-4118

APPENDIX A

Councilman Weber presented the following resolution and moved its adoption:

WHEREAS, published reports concerning the present and intended future actions of parties involved in the Dallas Love Field airport controversy have necessitated renewed public discussion concerning the policy of the City of Dallas towards the total closing of Love Field as an airport facility; and

WHEREAS, the Dallas City Council believes it to be in the public interest that there be no doubt of its determination of policy in this regard; Now, Therefore,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That the City Attorney be, and is hereby instructed to take such legal steps as may be necessary and proper in order to prevent the total closing of Love Field as an airport facility.

SECTION 2. That this resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so resolved.

APPROVED AS TO FORM:
N. ALEX BICKLEY, City Attorney

By _____
Assistant to City Attorney

Motion seconded by Councilwoman Patterson and unanimously carried.

WP
cc to Weber

Harold G. Shank
Harold G. Shank
City Secretary

APPROVED _____ APPROVED _____ APPROVED _____
HEAD OF DEPARTMENT CITY AUDITOR CITY MANAGER

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, and the DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Petitioners,*

v.

SOUTHWEST AIRLINES CO. and the TEXAS AERONAUTICS COMMISSION, *Respondents.*

BRIEF IN OPPOSITION FOR RESPONDENT, SOUTHWEST AIRLINES CO.

HERBERT D. KELLEHER
Oppenheimer, Rosenberg, Kelleher & Wheatley, Inc.
Suite 620, 711 Navarro
San Antonio, Texas 78205

JOHN L. HAUER
Akin, Gump, Strauss, Hauer & Feld
2800 Republic National Bank Building
Dallas, Texas 75201

Attorneys for Respondent, Southwest Airlines Co.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

BRIEF IN OPPOSITION 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

1. The Dallas-Fort Worth Regional Airport 3
2. Southwest Airlines Co. 12
3. Southwest Airlines Co. v. DFW 14

REASONS FOR DENYING THE WRIT 22

ARGUMENT 24

I. The Decision Below Is Clearly Correct 24

II. There Is No Conflict of Decision 44

III. There Are No Special and Important Reasons for Granting the Writ 47

CONCLUSION 51

TABLE OF AUTHORITIES

CASES:

Aircraft Owners and Pilots Ass'n v. Port Authority of New York, 305 F.Supp. 93 (E.D. N.Y. 1969) 50

Airport Commission of Forsyth County v. CAB, 300 F.2d 185 (4th Cir. 1962) 28

Bowles v. Willingham, 321 U.S. 503 32

Braniff Airways, Inc. et al. v. CAB et al., 473 F.2d 1150 (D.C. Cir. 1972) 15, 28

Burbank v. Lockheed Air Terminal, 411 U.S. 624 ..... 23, 45

City of Arlington v. Lillard, 116 Tex. 446, 294 S.W.2d 829 (Tex. Sup. 1927) 31

City of Dallas v. CAB, 221 F.2d 501 (D.C. Cir. 1954), cert. denied 348 U.S. 914 28

Page

City of Dallas et al. v. Southwest Airlines Co. et al., 371 F.Supp. 1015 (N.D. Tex. 1973), aff'd 494 F.2d 773 (5th Cir. 1974) 15
City of Fort Worth v. Lillard, 116 Tex. 509, 294 S.W. 2d 831 (Tex. Sup. 1927) 31
City of Houston v. Mann, 164 S.W.2d 548 (Tex. Sup. 1942) 51
Cooley v. Board of Wardens, 12 How. 299, 13 L.Ed. 996 42
Dower v. United Airlines, 329 F.2d 684 (9th Cir. 1964) 28
Greer v. Railroad Commission of Texas, 117 S.W.2d 142 (Tex. Civ. App.—Austin 1938, writ dism'd).. 32
MacGregor v. State Mutual Life Assurance Co., 315 U.S. 280 34
Northwest Airlines v. Minnesota, 322 U.S. 292 33
Outagamie County v. CAB, 355 F.2d 900 (7th Cir. 1966) 28
People v. Western Airlines, 42 Cal.2d 621, 268 P.2d 723 (Cal. Sup. 1954), appeal dismissed for want of a substantial federal question, 348 U.S. 859 28
Propper v. Clark, 337 U.S. 472 34
Railroad Commission of Texas v. Pullman, 312 U.S. 496 33
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 42
Silver v. Louisville & Nashville Railroad Co., 213 U.S. 175 33
Simpson v. Shepherd, 230 U.S. 352 33
Texas Aeronautics Commission et al. v. Betts, 469 S.W. 2d 394 (Tex. Sup. 1971) 15
Texas Aeronautics Commission et al. v. Braniff Airways, Inc. et al., 439 S.W.2d 699 (Tex. Civ. App. 1969), aff'd 454 S.W.2d 199 (Tex. Sup. 1970), cert. denied sub nom. Braniff Airways, Inc. et al. v. Texas Aeronautics Commission et al., 400 U.S. 943 .....15, 28
United Airlines v. Public Utilities Commission, 37 Cal. 2d 1 (1952), appeal dismissed for want of a substantial federal question, 342 U.S. 908 28
United States v. Abilene & S. Ry. Co., 265 U.S. 274 .. 47
United States v. City of New Haven, 496 F.2d 452 (2nd Cir. 1974), cert. denied 43 U.S.L.W. 3255 (U.S. October 29, 1974) 1, 23, 44

STATUTES: Page

Administrative Procedure Act, 5 U.S.C. Secs. 554 & 556 51

Airport and Airway Development Act of 1970

49 U.S.C. Sec. 1701 *et seq.*....23, 35, 38, 39, 41, 45, 47, 48
49 U.S.C. Sec. 1711(4) & (5) 41
49 U.S.C. Sec. 1716(f) 39

Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973...28, 42

Federal Airport Act, ch. 251, 60 Stat. 170 (1946)

49 U.S.C. Sec. 1101 *et seq.*..7, 23, 35, 38, 39, 41, 45, 47, 48
49 U.S.C. Secs. 1102-03 35
49 U.S.C. Sec. 1108 7
49 U.S.C. Sec. 1108(a) 35
49 U.S.C. Sec. 1108(b) 36
49 U.S.C. Sec. 1108(d)(1) 36
49 U.S.C. Sec. 1108(e) 36
49 U.S.C. Sec. 1110 36
49 U.S.C. Sec. 1111 37

Federal Aviation Act of 1958

49 U.S.C. Sec. 1301 *et seq.* 22, 23, 29, 32, 42, 45, 47
49 U.S.C. Sec. 1301(3) 4
49 U.S.C. Sec. 1301(4) 25
49 U.S.C. Sec. 1301(10) 4
49 U.S.C. Sec. 1301(24) 26, 45
49 U.S.C. Sec. 1349(a) 50
49 U.S.C. Sec. 1371 *et seq.* (Subch. IV) 24
49 U.S.C. Sec. 1374(b) 51
49 U.S.C. Sec. 1405 25
49 U.S.C. Sec. 1421 *et seq.* (Subch. VI) 24
49 U.S.C. Sec. 1432 25
49 U.S.C. Sec. 1508(a) 45
49 U.S.C. Sec. 1655(c)(1) 25

Noise Control Act of 1972, 42 U.S.C. Sec. 4901 *et seq.* . 46

Texas Aeronautics Act, Vernon's Ann. Civ. St.

Art. 46c-1 *et seq.* 30
Art. 46c-6, Subd. 3(c) 32

Texas Constitution, Art. 11, Sec. 5 30

Page

Texas Municipal Airports Act, Vernon's Ann. Civ. St.
Art. 46(d)-1 *et seq.* 30
Art. 46(d)-7(b) 30

Texas Statute, Vernon's Ann. Civ. St. Art. 1165 30

United States Constitution
Art. 6, cl. 2 45
Amend. V & XIV 51

CAB Decisions and Orders:

Dallas-Fort Worth Regional Airport Investigation
Order E-18719 (August 20, 1962) 4
Order E-21341 (September 30, 1964) 6
Order 73-9-82 (September 21, 1973) 6

Docket Nos.
23122, Order No. 71-6-79 (June 15, 1971) 15
23047, Order No. 71-9-23 (September 3, 1971) 15
22548-52, Order No. 72-6-1 (June 27, 1972) 15

Flying Tiger Line, Inc., Air Truck Service, 30 CAB 242 (1959) 32

Greensboro / High Point / Winston - Salem Service Through a Single Airport, 34 CAB 227 (1961) .. 17

National Airlines, Service to Fort Lauderdale, 41 CAB 85 (1964) 31

Miscellaneous:

Atty. Gen. Op. (Texas) (September 2, 1969) 31

Atty. Gen. Op. (U.S.), 40 Op. A.G. 71 (June 4, 1941).. 50

Aviation Daily (October 8, 1974) 18

City of Dallas, 1968 Concurrent Bond Ordinance..8, 10, 49

Civil Aeronautics Board, Reg. 202.3 32

Cong. Rec.
115-33278 40
116-4869 & 5035 40

DOT Press Release 18

Page

Federal Aviation Administration, Order No. 5190.6, "Airports Compliance Requirements" 38

Governor's Committee on Transportation (Report) .. 17

Texas Aeronautics Commission

Minute Order No. 22 .....32, 49
Rules of Practice and Procedure, Rule 49 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, and the DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Petitioners,*

v.

SOUTHWEST AIRLINES CO. and the TEXAS AERONAUTICS COMMISSION, *Respondents.*

BRIEF IN OPPOSITION FOR RESPONDENT, SOUTHWEST AIRLINES CO.

Respondent, Southwest Airlines Co. ("Southwest"), respectfully prays that a writ of certiorari be denied herein. This case does not involve airspace control or management in the interests of either safety or efficiency. It is, therefore, completely distinguishable from *United States* v. *City of New Haven*, 496 F.2d 452 (2nd Cir. 1974), appeal filed sub nom. *Town of East Haven* v. *United States*, 43 U.S.L.W. 3124 (U.S. July 30, 1974, No. 74-37), in which this Court recently de-

nied certiorari. 43 U.S.L.W. 3255 (October 29, 1974). This case involves only a jurisdictional squabble between the State of Texas and the City of Dallas as to which has the right, under Texas law, to determine the routes of a State certificated, commuter airline operating solely within the boundaries of Texas and not subject to the jurisdiction of the Civil Aeronautics Board ("CAB"). As such, this case clearly presents no "special and important reasons" for granting review on writ of certiorari.

QUESTIONS PRESENTED

1. Whether certain Federal statutes, establishing criteria of eligibility for Federal aid to local airport development projects, supersede the Federal Aviation Act of 1958, which, as a matter of public convenience and necessity, delegates to the Civil Aeronautics Board the power to determine airport points of service for interstate airline transportation, and preserves the identical power in the states for intrastate airline transportation.

2. Whether, in violation of the Texas Constitution and general laws, the City of Dallas can make determinations of public convenience and necessity with respect to intrastate commuter service by Southwest Airlines Co. at Love Field, a public facility which remains open for aeronautical activity.

3. Whether the attempt to exclude Southwest Airlines Co. from Love Field, by municipal ordinance or otherwise, constitutes unjust discrimination; the impermissible grant of a right of exclusive use; a violation of Dallas' own covenants in bonds owned by Southwest Airlines Co.; a violation of the Administra-

tive Procedure Act, 5 U.S.C. Secs. 554 and 556, and of the Fifth and Fourteenth Amendments to the United States Constitution; a violation of 49 U.S.C. Sec. 1374 (b); a violation of the Equal Protection Clause and of the right to travel freely and to have access to the navigable airspace; and unjust discrimination on the basis of wealth.

STATEMENT OF THE CASE

Southwest sets forth its own Statement of the Case in order to correct inaccuracies and to supply omissions in Petitioners' Statement.

This litigation concerns Southwest's right to provide intrastate commuter air service through Dallas' downtown airport, Love Field ("Love"), rather than through the outlying Dallas-Fort Worth Regional Airport ("DFW"), which opened on January 13, 1974. In comparison to District of Columbia air service, Love Field is the equivalent of Washington's National Airport and DFW is the equivalent of Virginia's Dulles Airport. (R. 595) [1]

The controversy arose in the following manner.

1. *The Dallas-Fort Worth Regional Airport.* In 1962, CAB certificated air carriers served Fort Worth through Greater Southwest International Airport ("GSIA") and Dallas through Love Field, although the two airports are only twelve air miles apart. (R. 1972) As testified to by Mr. Henry L. Newman, Director of the Southwest Region for the FAA, such an arrangement became "an economic burden on the airlines

[1] Record references are to the printed Appendix filed in the Court of Appeals, using the typed numbers appearing in the middle of each page of such Appendix.

to the point that the service to both cities was being jeopardized." (R. 544) In large part, as related by Mr. Newman, this burden resulted from the advent of commercial jet aircraft, which "are just a lot more costly . . ., it's just completely uneconomical for jets to make landings at such close proximity." (R. 958)

Motivated by their own economic problems, the CAB air carriers prevailed upon the CAB to institute the Dallas-Fort Worth, Texas, Regional Airport Investigation, Docket No. 13959, which commenced on August 20, 1962 pursuant to CAB Order No. E-18719. (R. 1971) This Order is reprinted in Respondent's Appendix A. It recites that regional airport investigations are "a vital part of our effort to assist the air transportation industry to realize the full economic potential of its greatly expanded capacity in new high performance equipment without resulting in inconvenience to the users and without adversely affecting, the public interest . . . ." It ordered that the Dallas-Fort Worth Regional Airport Investigation be instituted "to determine whether the public convenience and necessity require the alteration, amendment or modification of the certificates of all air carriers[2] authorized to serve either or both Dallas and Fort Worth, Texas, in such manner as to require that Dallas and Forth Worth be served through a single airport to be designated therein." It directed that the CAB certificated carriers serving Dallas and Fort Worth be "made parties to this proceeding."

---

[2] Under the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301 (3) and (10), "air carrier," with respect to domestic operations, refers only to airlines engaged in interstate air transportation or the transportation of mail. Southwest is not engaged in interstate air transportation nor does it carry mail.

Thereafter, the CAB held hearings in which the issue presented was whether or not the certificates of its carriers should be amended so as to require them to serve only Love Field or GSIA. Braniff Airways, Inc. ("Braniff") and the City of Dallas ("Dallas") presented extensive evidence showing that Dallas generated approximately 80% of the air passengers in the area and that short haul (under 300 miles) passenger traffic would be drastically inconvenienced and dramatically reduced if the CAB should designate outlying GSIA as the sole CAB air carrier airport. (R. 1911-12; 4900-5088; 5095-5329) DFW is as far from Dallas as GSIA, and Braniff was the principal short haul carrier in the Dallas market prior to entry by Southwest. (R. 1419; 1426; 1913-14) Subsequently, Texas International Airlines ("TI"), the only other CAB air carrier with a substantial stake in the Dallas short haul markets, informed the CAB that: (i) transfer of its service from Houston's downtown Hobby airport to Houston's outlying Intercontinental Airport had caused a $2,200,000 decline in revenue the first year due to loss of short haul passengers; (ii) the similar move from Love to DFW would have a "violent impact" because the "time for ground transportation from the airport to Dallas will now be longer than some of these [short haul] flights, thus making the automobile far more competitive for the inter-city traffic"; and that, for these reasons, (iii) TI "may well require [increased subsidy] assistance in coping with the cost escalation and traffic dislocation" involved in its move to DFW. (R. 5625) At that time, twenty-five percent of TI's passenger traffic enplaned at Love, and not all of it was short haul in nature. (R. 5625) All of Southwest's traffic is short haul, and 95% of it originates or terminates at Love. (R. 1420)

TI is subsidized by the CAB. (R. 1261) Southwest receives no subsidy. (R. 1261)

The FAA appeared before the CAB in the CAB's Regional Airport Investigation and advocated selection by the CAB of GSIA as the CAB air carrier airport. (R. 896) Instead, the CAB granted Dallas and Fort Worth ("Cities") time to agree upon either GSIA or Love as such airport, stating, in Order No. E-21341 issued on September 30, 1964, that "the Board is now of the unanimous opinion that service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present and future requirements for transcontinental cargo and passenger service." (R. 1978-80) Because of inflamed municipal rivalries, the Cities could not so agree and, hence, they decided to build gigantic DFW at Grapevine, Texas, which is midway between the two cities and just north of GSIA. (R. 630; 1419; 1426) The CAB did not envision, nor order, the construction of DFW, and, in fact, it later terminated its Regional Airport Investigation without amending the certificates of its air carriers so as to require them to serve DFW. This Order, No. 73-9-82, is reprinted in Respondent's Appendix B. Petitioners have applied to reopen the Investigation for the purpose of amending the CAB certificates, an action which demonstrates their complete lack of faith in the effectiveness and enforceability of both their own 1968 Concurrent Bond Ordinance and the FAA's National Airport Plans, discussed subsequently.

When the FAA learned of this surprising DFW decision in September of 1965, Mr. Henry L. Newman flew to Washington, D. C., and, at an informal conference, obtained an oral commitment from General

McKee, then Administrator of the FAA, for Federal grants under the Federal Airport Act of 1946, ch. 251, 60 Stat. 170. (R. 896) This commitment was, of course, made before DFW was included in the National Airport Plan, as required under the 1946 Federal Airport Act, 49 U.S.C. Sec. 1108. Mr. Newman testified that:

> ". . . one of the things that General McKee said to me was this, 'This is a major decision, because we're giving up an investment at Greater Southwest, [which has to be closed because of an air traffic control conflict with DFW,] and whatever we do today means that we're committed to follow through on the development of this airport." (R. 897)

The first grant to DFW, for land acquisition, was made on June 24, 1966. (R. 896)

Mr. Newman also testified that General McKee had one major question during their September, 1965 meeting: "What assurance do we have that this new airport is going to be used by the airlines?" (R. 897) Mr. Newman reportedly thereupon told General McKee:

> ". . . very emphatically that it was the determination . . . that one of the basic commitments on this airport would be that if this airport was developed, that all of the airlines would transfer their activities to the new airport, and had it not been for that decision, the FAA would not have concurred in the development of this airport or the commitment to put the what is now 60 some million, and I assume will be substantially greater than that in the years to come." (R. 897)

This hearsay testimony as to an oral exchange between two FAA officials, wherein Mr. Newman apparently

purported to speak for both the CAB and the Texas airline regulatory authority, constitutes the only "evidence" in the entire record of this case of any Federal "action" designed to insure that all airlines would serve DFW. It is also the cited source for the statement on page 9 of the Petition that Federal aid was predicated upon a "series of assurances that all scheduled airline activity would be conducted at the Regional Airport. (R. 897)." There is no Federal hearing, rule, regulation, decision, order, or grant agreement, by the CAB or the FAA, which requires either Federal or State airlines to serve DFW, and none are cited in the Petition.

Having agreed upon the Grapevine location, the Cities proceeded to arrange funding for DFW. The citizens of Dallas County voted down financing for an autonomous Regional Airport Authority authorized by the Texas Constitution, whereupon the two City Councils, by contract, created the Dallas-Fort Worth Regional Airport Board ("Airport Board") to act as an administrative arm of both Cities with respect to the construction and operation of DFW. (R. 8-9; 1580-81; 4690-4707)

In November, 1968, the two Cities respectively adopted the 1968 Regional Airport Concurrent Bond Ordinance ("1968 Ordinance"), pursuant to which they sold $35,000,000 worth of revenue bonds to local interests and which is the model for five subsequent ordinances authorizing sale of an additional $387,000,000 in revenue bonds. (R. 2040-3690; 517-19) These bonds are basically payable out of the revenues of DFW. (R. 2147) DFW revenues will always be sufficient as the eight CAB air carriers now serving the Cities have, by private contract, agreed to transfer

their "Certificated Air Carrier Services" to DFW and to underwrite any deficit arising from its operation, including all operations and maintenance expenses and 1.25 times the annual debt service on the DFW revenue bonds. (R. 3691-786; 876; 1722-24; 1816) This is a mutually beneficial financing arrangement by which the CAB air carriers receive lower interest rates on the construction of needed airport facilities, because the bonds in question are tax free municipals, and the Cities are provided with suitable airport accommodations without any financial risk on their part. (R. 1558; 1561; 1572-73; 1816) The Director of Finance for DFW testified with respect to this arrangement as follows:

> "Q. Isn't it true, Mr. Laman, that really what you have done out there at the Regional Airport is to make all of these [CAB] airlines a partner in the airport itself, in effect?
> "A. That's correct." (R. 1758)

Thus, the CAB air carriers provoked the Regional Airport Investigation in order to relieve themselves of an uneconomical dual airport operation; the CAB, acting in the interest of public convenience and necessity, obliged by stimulating the Cities to designate a single airport for interstate air service; the Cities resolved their civic differences by electing to construct DFW at Grapevine; the CAB air carriers voluntarily agreed to transfer their "Certificated Air Carrier Services" to DFW and to become "partners" of the Cities by paying any deficit at the new airport; and, since all concerned were receiving just the economic benefits they wanted from their partnership, there was complete harmony until Southwest began operations and the Cities, at the behest of their CAB partners, attempted to coerce it into the partnership.

This coercion is predicated upon the 1968 Ordinance adopted by Dallas. This Ordinance represents the only relevant, legally significant action ever undertaken, by any Federal or State governmental body or agency, in order to control and restrict the use of Love Field as such. Section 9.5 of the Ordinance makes it perfectly plain that such restrictions are not designed to enhance the public convenience and necessity, nor to achieve safer and more efficient utilization of the navigable air space. They are, purely and simply, designed to suppress free competition so that revenues at DFW will be maximized for the benefit, not of the Cities, but of the underwriting CAB air carriers:

> "Section 9.5. Competition, Optimum Airport Development.
>
> "A. It is acknowledged and understood by the Cities that they, in *Love Field*, Redbird, GSIA and Meacham Field, own and operate airports which by their nature are *potentially competitive with the operation of the Regional Airport.* It is further acknowledged and recognized that *the revenues to be derived from those airport facilities are not*, under the terms of this Ordinance, *pledged to the payment of the Bonds*, except under the circumstances described in Section 6.3 hereof. Accordingly, the Cities, each with respect to its own individually owned airport facilities, as above named, hereby covenant and agree that from and after the effective date of this Ordinance, shall *take such steps as may be necessary, appropriate*, and *legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field*, Redbird, GSIA and Meacham Field, *of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport* effective upon the beginning of operations at the Regional Airport.

"From time to time hereafter, the Board may review the effect and application of such covenant, and, by concurring action of not less than eight (8) of its members, *the Board may reasonably limit its scope and effect and may waive its application in specific instances* if it shall first determine that such action is necessary (1) in the interest of the *public safety*; (2) in the interest of *prudent and efficient operations* at the Regional Airport; or (3) *in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region considered as a whole.* However, in order to promote, by voluntary agreement, the full use of the Regional Airport at the earliest practicable date by commercial air carriers, *the Board shall be authorized* to establish policies and *to make* uniformly applicable and non-discriminatory *agreements with air carriers regarding the instances if any, in which the above power granted to the Board will or will not be exercised, and no limitations on such covenant shall be promulgated or its application in specific instances waived if the result thereof would be to violate such agreements.* . . ."

* * *

"B. In addition to the covenant of the Cities contained in paragraph A, next above, regarding the transfer of Certificated Air Carrier Services, the *Cities further agree that they will* through every legal and reasonable means *promote the optimum development* of the lands and Facilities comprising the *Regional Airport* at the earliest practicable date, *thus to assure the receipt of Gross Revenues therefrom to the maximum extent possible, and neither the Cities nor the Board will undertake with regard to* the Regional Airport, *Love Field*, GSIA, Meacham Field or Redbird, *any action, implement any policy, or enter into any agreement or contract which by its or their nature*

> *would be competitive with or in opposition to the optimum development of the Regional Airport and the use of its lands and Facilities* at the earliest practicable date; . . ." (R. 2195-97)

In two sections, this remarkable city Ordinance not only attempts to restrain trade and commerce in Dallas but also purports to usurp the powers of the FAA, of the CAB, and of the Texas Aeronautics Commission ("TAC") by permitting the Airport Board to authorize resumption of "Certificated Air Carrier Services" at Love in the interests of "public safety," "prudent and efficient operations," or "an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region . . . ;" provided, however, that the Airport Board has not earlier entered into a contrary, supervening agreement with the CAB air carriers "regarding the instances, if any, in which the above power granted to the Board will or will not be exercised . . . ."

2. *Southwest Airlines Co.* Southwest is an intrastate, short haul, commuter carrier providing air service between only the Texas cities of Dallas, Houston, and San Antonio. (R. 1278-80) Its operations are certificated solely by the Texas Aeronautics Commission and not by the CAB. (R. 1915-17; 1956) Over its routes, it does, however, compete with several CAB certificated air carriers, principally Braniff and TI, which carry intrastate passengers but are not certificated by the TAC. (R. 1383; 1916-17)

As a short haul, intrastate commuter carrier similar to California's Pacific Southwest Airlines ("PSA"), Southwest's sole mission is to serve the public convenience and necessity of Texas air passengers commuting between Houston, Dallas, and San Antonio,

three cities which are an average of only 230 miles and 45 minutes apart by air. (R. 1284; 4434) Unlike the long haul CAB air carriers, Southwest must strenuously compete with ground transportation for 100% of its passengers, since travel by private automobile, bus, and train provides exceedingly feasible alternatives to air transportation in its markets. (R. 1420; 1444; 1954-55) Consequently, the TAC has charged Southwest with the responsibility of reducing *total* trip time and expense for the short haul commuter passenger, insofar as it is within the Company's power to do so. (R. 1284-91; 1300-08; 1915)

In order to promote and expand its distinctive short haul commuter air passenger market, Southwest has provided service far superior to that of the CAB air carriers who preceded it in the market. It has, for instance, furnished 98.7% on-time performance; 99% completion of its scheduled flights; 10 second cash register ticketing; expedited baggage handling; faster reservations service; and $13.00 fares, more than 50% lower than the CAB fares in the market prior to Southwest's entry in June, 1971. (R. 1284-91; 1300-11; 1965-66) See *Texas Aeronautics Commission* v. *Braniff Airways, Inc.*, 454 S.W.2d 199 (1970), *cert. denied* 400 U.S. 943, for a factual discussion by the Texas Supreme Court of the poor quality of CAB air carrier service preceding Southwest's market entry.

The most significant and crucial move made by Southwest in order to better accommodate the commuter passenger was its reopening of Houston's close-in Hobby Airport to scheduled commercial air service. This was accomplished with the complete blessing of the City of Houston and resulted in a quantum leap in the number of local passengers carried by

Southwest. (R. 1297-99) In fact, if Southwest had not ceased serving Houston's outlying Intercontinental Airport and moved its operations to close-in Hobby instead, it would be bankrupt today. (R. 1298-99) As it is, the whole Houston-Dallas commuter air passenger market, which was completely stagnant prior to entry by Southwest, is now growing at the rate of over 50% per year and Southwest is a financial success. (R. 1452; 1317-18; 4419-20) Obviously, therefore, Southwest's improved service at lower fares to Houston's close-in Hobby Airport stimulated the short haul market and caused tremendous numbers of people to fly who would otherwise be utilizing ground transportation or not traveling at all. (R. 1317-19; 1498)

The increased ground travel time and expense involved in getting to an outlying airport adversely affects short haul air transportation, which is why air travel under 300 miles declined 16% after Houston's distant Intercontinental Airport opened as the sole airport in Houston, while air travel over 300 miles increased by 23%. (R. 1454; 4451-52)

3. *Southwest Airlines Co.* v. *DFW.* Southwest was certificated by the TAC on February 20, 1968, nine months prior to adoption of the 1968 Ordinance, and commenced operations on June 18, 1971, one year after the CAB air carriers had executed the letters ("Letter Agreements") whereby they voluntarily agreed to transfer their "Certificated Air Carrier Services" to DFW and to underwrite its deficits. It is understandable, however, that Southwest was not consulted on either the 1968 Ordinance or the Letter Agreements, as no one outside the Company suspected that it could survive the deluge of proceedings instigated against it by, or for the benefit of, CAB air carriers. The peti-

tion for a writ herein represents the nineteenth judicial or administrative matter concerning Southwest's operating authority, since it applied for a certificate of public convenience and necessity in November, 1967. (R. 1916-49; 333-40) Of these proceedings, the following, listed in chronological order, are reported: *Texas Aeronautics Commission, et al.* v. *Braniff Airways, Inc., et al.*, 439 S.W.2d 699 (Tex.Civ.App. 1969); *Texas Aeronautics Commission et al.* v. *Braniff Airways, Inc., et al.*, 454 S.W.2d 199 (Tex. Sup. 1970); *Braniff Airways, Inc., et al.* v. *Texas Aeronautics Commission, et al.*, 400 U.S. 943; CAB Docket No. 23122, Order 71-6-79 (June 15, 1971); *Texas Aeronautics Commission, et al.* v. *Betts*, 469 S.W.2d 394 (Tex. Sup. 1971); CAB Docket No. 23047, Order No. 71-9-23 (September 3, 1971); *Braniff Airways, Inc., et al.* v. *CAB, et al.*, 473 F.2d 1150 (D.C. Cir. 1972); CAB Agreements 22548-52 and 22665, Order 72-6-1 (June 27, 1972); *City of Dallas, et al.* v. *Southwest Airlines Co., et al.*, 371 F. Supp. 1015 (N.D. Tex. 1973); *City of Dallas, et al.* v. *Southwest Airlines Co., et al.*, 494 F.2d 773 (5th Cir. 1974); *City of Dallas, et al.* v. *Southwest Airlines Co., et al.*, No. 74-324 (U.S. Sup. Ct.). In addition, three proceedings before the TAC: two in State District Court; one in Federal District Court; one before the Bureau of Enforcement of the CAB; and one before the Airport Board are not reported.

Southwest refused to execute a Letter Agreement with the Airport Board and has never, either expressly or impliedly, been ordered to serve DFW by its regulatory agency, the TAC, which has, in fact, directed it to stay at Love. (R. 4366-69) Southwest's position on this issue is dictated by considerations of public convenience and necessity, which are inextricably inter-

twined with its own survival as an airline. Southwest serves a distinctive market within the airline industry: the short haul commuter passenger. He constitutes its *only* public. If it fails him, it fails.

Forcing Southwest to serve DFW is the equivalent of requiring Eastern Airlines to provide its New York-Washington, D.C. shuttle service through Dulles Airport. There can be no doubt that the added ground travel time and expense to DFW would injure the public interest by deterring the short haul commuter passenger from flying, or even traveling at all, between the cities served by Southwest. The record is overwhelmed with uncontroverted evidence on this point, of which the following are merely examples:

A. In every other city in the United States which maintains a dual airport system, short haul flights operate through the close-in airport and long haul flights through the outlying airport. Dallas is striving to become the only exception, although it admits that neither it nor the Airport Board have ever made any market studies or taken any public opinion surveys or passenger preference polls concerning the adverse impact the move to DFW will have upon short haul air transportation. (R. 1325-26; 678; 860-61; 1152; 1196; 1253-54; 1414; 1550; 1766-67; 1774)

B. Mr. John Eichner, of Simat, Helliesen & Eichner, transportation specialists who appear before the CAB more than any other firm in the country, testified that the short haul air passenger market would be seriously diminished if Southwest moved to DFW (R. 1416; 1427; 1444; 1491); that the taxi fare to DFW would be more than Southwest's $13.00 air fares on flights to Houston and San Antonio (R. 1443); that Southwest

had saved the short haul commuter passenger more than $4,000,000 in direct air transportation costs since commencement of operations, all of which would be dissipated if Southwest were required to serve DFW (R. 1421; 1443; 1481); and that Southwest might collapse if it were forced to DFW. (R. 1473)

C. The CAB itself has recognized that short haul airlines must necessarily serve close-in airports, stating in its decision in *Greensboro/High Point/Winston-Salem Service Through A Single Airport*, Docket No. 3496, Order E-17359 (August 24, 1961), that Piedmont Airlines, unlike the trunk carriers Eastern and United Airlines, should not be ordered to serve Winston-Salem through the distant Greensboro/High Point's Friendship Airport because:

> "... the examiner found that such consolidation would place an unreasonable financial, as well as operating, burden upon Piedmont and would impose considerable inconvenience upon the area's traveling public. We agree with his differentiation of Piedmont's situation from that of the trunklines in that Piedmont, as a local service carrier, is primarily required to provide service to the traveling public to and from relatively small cities over relatively short distances, and that Piedmont's breakeven need would be considerably increased by reason of a reduction of passenger revenue following consolidation...." 34 CAB 227, 231.

D. The FAA, through Mr. Newman, has stated that the long driving time between DFW and downtown Dallas, on the one hand, and Intercontinental and downtown Houston, on the other, will seriously inhibit air travel between these two cities. (R. 4416) The Governor's Committee on Transportation of the State of Texas concurs. (R. 1954; 5660; 5673-74)

E. The United States Department of Transportation ("DOT") is limiting the use of Washington's close-in National Airport to short haul flights and removing long haul flights to outlying Dulles Airport because, in the words of the FAA Administrator:

> "National—only ten minutes from downtown Washington—is ideally situated to serve the short-haul market where ground travel time is a significant part of the total trip and often a determining factor in whether a traveler goes by air or uses another mode of transportation.
>
> "Dulles is especially suited for the international and long-haul markets where ground travel time is a less critical factor. Its long runways, large ramp areas and modern terminal facilities were specifically designed for long-range, heavier aircraft and their users." (R. 4410)

F. Volume 215, Issue No. 26 (October 8, 1974), page 201, of *Aviation Daily*, a trade publication customarily read and relied upon in the aviation industry and reprinted as Respondent's Appendix C, reports, under the heading "AIRPORT AID PROGRAM BECOMING HEATED ISSUE," that:

> "Transportation Department is taking a close look at the Airport Development Aid Program (ADAP) to determine what it may want to 'change or throw out as a national policy,' according to Secretary Claude Brinegar . . . .
>
> "Brinegar said ADAP has become an 'increasingly hot policy issue.' This view is similar to one expressed earlier by Sen. Howard Cannon (D. Nev.), who said ADAP is expected to be the 'biggest issue' next year before Cannon's aviation subcommittee. (DAILY, Aug. 7)

> "*Bringar said that the era of the super airports such as Dallas Fort Worth is coming to an end.* Greater emphasis will be placed on managing the capacity of existing airports 'as best we can,' he said. *One way this could be done is by increasing use of airports replaced by giant complexes such as . . . Dallas Love Field.*" (emphasis added)

The facts are that every Federal and state regulatory authority recognizes the necessity of furnishing short haul air transportation through close-in airports; that this is the accepted policy and practice in every other American city having a dual airport system, including Washington, D.C. where the system is governed by the FAA; that increased use of Love Field is being proposed by the Secretary of Transportation; that neither the DOT nor the FAA have yet seen fit to intervene in this proceeding despite knowledge of its pendency prior to commencement of trial; and that the overwhelming evidence of public convenience and necessity incontrovertibly demonstrates that Southwest's presence at Love rather than DFW serves the public interest. Why, then, are the Petitioners before this Court on an FAA preemption contention, contrived under nonregulatory Federal grant statutes, when they did not even think highly enough of this argument to raise it in their District Court pleadings (reprinted in Respondent's Appendix D), or to present any evidence concerning it at the trial?

Petitioners have claimed that they are worried about the financial well-being of DFW, but this cannot be so for the following reasons:

A. Prior to the opening of DFW, Southwest conducted 8,952 out of a total of 304,000 aircraft opera-

tions per year at Love. (R. 1240; 1388) This is 2.9%. Southwest enplaned 140,464 passengers out of a total of 5,816,250 enplanements per year at Love. (R. 1387; 4421) This is 2.4%. In projecting future airport requirements for the Dallas area, the Airport Board missed its forecast of enplanements at Love during 1972 by 2,272,000 passengers. (R. 1232) Southwest's total enplanements of 140,464 are only 6% of this mistake. Southwest would deflect $400,000 in revenues from DFW to Love each year, as compared with a total revenue projection for DFW, in 1975, of $43,400,000. (R. 3600-03) This is nine-tenths of one percent (.009). DFW is a nine-mile long, 17,520 acre, $600,000,000 facility. (R. 4364-65; 5575) Southwest operated three, and now operates four, airplanes. (R. 1282)

B. The Cities presented an Exhibit supposedly showing that $3,593,000 in revenues per year would be lost at DFW if Southwest stayed at Love. (R. 4361-63). This conclusion was premised upon the false assumption that all of the CAB air carriers would retain intrastate air service at Love in order to compete with Southwest for intrastate traffic to Texas cities not even served by Southwest and over routes where it does not compete with such carriers. (R. 4361-63) Ignoring the illogic of this Exhibit, it may be noted that under any factual hypothesis contained therein the Exhibit shows DFW receiving an amount of revenue necessary to cover *all* of its costs and expenses, *regardless of what Southwest and the CAB carriers do.* (R. 4361-63; 1203) This is simply because the CAB air carriers, through their Letter Agreements, have undertaken to pay any and all deficits at DFW, including 1.25 times annual debt service on the DFW Revenue Bonds, and their guarantee is backed by $150,000,000 in an-

nual net revenues before taxes (more now, since Delta Airlines alone has just reported a record $94,000,000 profit). (R. 1209; 1327; 1722) The Finance Director for the Airport Board admitted that all eight CAB underwriting air carriers would have to become bankrupt and go out of business before DFW could lose one penny of revenue as a result of Southwest's remaining at Love. (R. 1723-24)

C. First Southwest Company, an investment banking concern, is financial adviser to DFW. (R. 1813; 5390-95) On March 10, 1972, it vouchsafed its professional opinion that Southwest's absence from DFW would not be a fact of any material significance with respect to $112,000,000 of DFW Revenue Bonds to be issued on March 29, 1972. (R. 5396-97) Thomas Sullivan, the Executive Director of the Airport Board and its Chief Executive Officer, delivered himself of the same opinion in a letter of March 16, 1972. (R. 5398-5400) The Official Statements issued in connection with subsequent DFW bond offerings contained similar representations upon which bond underwriters and the investing public were entitled to rely. (R. 5401-5613) Mr. Decker Jackson, President of First Southwest Company, stated during his testimony that Southwest's remaining at Love was immaterial to the financial well-being of DFW. (R. 1885)

Forcing Southwest to DFW is clearly contrary to considerations of public convenience and necessity and unnecessary to assist DFW with its existing financial deficits. What, then, supplies the motive for bringing this case before the Supreme Court of the United States? The answer may be found in Dallas' answer to Southwest's interrogatories nos. 16 and 17, which together ask in what respect, if any, Southwest's remaining at Love would impair Petitioners' ability to

"manage, control and discharge the bonded indebtedness for the Dallas-Fort Worth Regional Airport?"

> ". . . Loss of access to numbers of enplaning passengers of this magnitude to *air carriers* operating out of the Dallas-Fort Worth Regional Airport over the same intrastate routes, and the loss of the supplemental revenues anticipated from the use by these passengers of Dallas-Fort Worth Regional Airport parking facilities and other concessions, could well jeopardize the ability of *air carriers* operating at the Dallas-Fort Worth Regional Airport to pay the contracted rentals, fees, and charges, and such competitive operation of airports contrary to the contracts and ordinances of the Cities of Dallas and Fort Worth would impose insurmountable burdens upon *such carriers.*" (emphasis added) (R. 1803-06)

As has been demonstrated above, the answer is fallacious in and of itself, but it does show Dallas' preoccupation with the self-interest of the CAB air carriers, rather than with the desires and convenience of that segment of the public represented in the person of the short haul, commuter air passenger. It is true that the CAB air carriers have incurred liabilities in building their transcontinental airport to suit their own convenience and economies. This does not, however, signify that Southwest should perish in order to provide a small and temporary palliative for their transient economic woes at DFW.

REASONS FOR DENYING THE WRIT

Under the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301 et seq., the FAA regulates matters pertaining to safety, including the use of the navigable airspace. But this case does not involve safety or use of the navigable airspace. Under the Federal Aviation Act of

1958, the CAB, in the interest of public convenience and necessity, governs the service of particular airports by interstate air carriers. But this case does not involve an interstate air carrier. Instead, this case involves economic regulation of an intrastate carrier by the TAC, pursuant to power expressly preserved in the states by the Federal Aviation Act of 1958 and reserved to the TAC by State law. Neither the FAA, the CAB, nor the City of Dallas may determine the routes of Southwest Airlines, of which service to Love Field is an integral part. The Federal Airport Act, ch. 251, 60 Stat. 170 (1946) and its successor, the Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1701 et seq., do not disrupt the Federal-state regulatory scheme ordained by the Federal Aviation Act of 1958. These 1946 and 1970 Acts merely establish guidelines and eligibility standards for the granting of Federal aid to local airport projects upon application for such aid by local interests. The facts and applicable law in this case bear no relationship to the facts and issues implicated in *Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624 and in *United States* v. *City of New Haven*, 496 F.2d 452 (2nd Cir. 1974).

The decision below is correct; there are no conflicts in decision or principle with other cases; and, certainly, there are no special and important reasons for granting a writ herein.

ARGUMENT

I

THE DECISION BELOW IS CLEARLY CORRECT

The United States District Court for the Northern District of Texas did not grant Southwest the right to serve Love Field "in perpetuity." It ordered and declared that *Dallas* could not exclude Southwest from the use of such airport, a publicly owned, financed, and operated facility, "so long as Love Field remains open as an airport." (Pet. App. 38b)

The United States Court of Appeals for the Fifth Circuit affirmed, holding that the TAC, in the interest of statewide public convenience and necessity, had, under the facts of this case, sole power to determine whether or not Southwest should serve Love. This decision is eminently correct since neither the CAB nor the FAA has any role to play herein, and the authority of the TAC is paramount to that of Dallas under Texas law.

The classic axiom of the basic government course is true: the CAB operates in the field of economics and the FAA in the realm of safety. Subchapter IV of the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1371 et seq., sets forth the substantive regulatory powers of the CAB. It is entitled "AIR CARRIER ECONOMIC REGULATION." Subchapter VI of the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1421 et seq., sets forth the substantive regulatory powers of the FAA. It is entitled "SAFETY REGULATION OF CIVIL AERONAUTICS." In the creation of the Department of Transportation, the functions, powers, and duties of the preexisting Fed-

eral Aviation Agency were transferred to the Secretary of Transportation:

> "*Provided, however*, That there are hereby transferred to the Federal Aviation Administrator, and it shall be his duty to exercise the functions, powers, and duties of the Secretary *pertaining to aviation safety* as set forth in sections 306, [etc.] of the Federal Aviation Act of 1958, as amended." (emphasis added) 49 U.S.C. Sec. 1655(c)(1).

49 U.S.C. Sec. 1405 sets forth in summary form the basic powers and duties of the Administrator with respect to safety of civil aircraft in "air commerce." His jurisdiction extends to intrastate flights by virtue of 49 U.S.C. Sec. 1301(4), which defines "air commerce" to mean, *inter alia*, "any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce." Thus, with respect to safety, Southwest is regulated by the FAA in exactly the same manner as the CAB trunk and regional air carriers.

49 U.S.C. Sec. 1432, first enacted in 1970, sets forth the only regulatory powers of the FAA with respect to airports, as such. This provides that the Administrator is empowered to issue airport operating certificates to airports serving air carriers certificated by the Civil Aeronautics Board and to establish minimum safety standards for the operation of such airports. Love Field, of course, qualifies, since, up until DFW's opening on January 13, 1974, it was the seventh most active airport in the world. (R. 970) It is also presently served by one CAB carrier, TI, which offers flights only between Love and Austin, Texas. As stated

by Mr. Henry L. Newman, Director of the Southwest Region for the FAA:

> "Q. Mr. Newman, to get one thing out of the way quickly, you're not saying that Love Field was an unsafe airport back in 1963 and you're not saying it is unsafe today?
> "A. That's correct. . . ." (R. 586)

Pursuant to its regulatory authority over safety matters, the FAA also controls use of the navigable air space, which is defined as "airspace above the minimum altitudes of flight prescribed by regulations under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. Sec. 1301(24). When the air space surrounding an airport is on the verge of undue congestion, the FAA eliminates the problem through a "flow control exercise" which spaces the departure and arrival of flights. There are, of course, no air space problems at Love or in the Dallas/Fort Worth area as a whole. Love accommodates 110 to 115 IFR operations per hour and served the entire airline industry prior to the opening of DFW, which now provides an additional capacity of 117 IFR operations per hour. (R. 623; 551) With or without Southwest, Love remains open to its full capacity for service by all types and sizes of aircraft engaged in both commercial and general aviation. (R. 970-73; 1237-47)

As far as commingling of commercial and general aviation is concerned, Petitioners seek to leave the impression that, for some imperative reason of overriding national significance, DFW is restricted to commercial and Love to general aviation uses. Nothing could be further from the truth, since such a division is

neither sanctioned by law nor effectuated in fact. DFW is open to all types of aeronautical uses and services "because if for no other reason than we have received Federal aid." (R. 903) This statement was made by Mr. Thomas Sullivan, Executive Director of DFW, who is a man of "considerable standing" in the field of airport development and management. (R. 700) Love has also received Federal aid, and Mr. Newman testified that, as to commercial versus general aviation: "As far as the FAA is concerned, both types of traffic are safe and we encourage and strongly support both means of travel of aviation." (R. 913)

As Southwest's Statement of the Case clearly demonstrates, DFW was constructed to promote the economic well-being of the CAB air carriers, acting in conjunction with the Cities. The CAB provided the catalyst through its Order threatening to amend its certificates so as to require CAB air carrier service through only Love or GSIA, but this was premised on considerations of public convenience and necessity rather than of safety. As admitted by Mr. Newman:

> "A. I guess I must answer probably had the Board not made that determination, there would not be a Regional Airport under construction, and we [the FAA] would not have had the requirement to put it in." (R. 581)

Since this matter does not involve air safety or airspace regulation in any conceivable way, shape, or form, the FAA has no jurisdiction and is eliminated as a concerned regulatory body.

The CAB has traditionally exercised the right to designate a particular airport as a point of service in connection with the administration of its route making authority, and this right has consistently been up-

held by the courts as essential to the proper economic regulation of CAB air carriers. *City of Dallas* v. *CAB*, 221 F.2d 501 (D.C. Cir. 1954), *cert. denied* 348 U.S. 914; *Airport Commission of Forsyth County* v. *CAB*, 300 F.2d 185 (4th Cir. 1962); *Outagamie County* v. *CAB*, 355 F.2d 900 (7th Cir. 1966).

The CAB's jurisdiction under the Federal Aviation Act of 1958 extends only to carriers engaged in interstate air transportation, however, and not to a carrier such as Southwest, which is solely engaged in intrastate air service. *Braniff Airways, Inc.* v. *CAB and Southwest Airlines Co.*, 473 F.2d 1150 (D.C. Cir. 1972); *Texas Aeronautics Commission and Southwest Airlines Co.* v. *Braniff Airways, Inc.*, 454 S.W.2d 199 (Tex. Sup. 1970), *cert. denied* 400 U.S. 943; *Dower* v. *United Airlines*, 329 F.2d 684 (9th Cir. 1964); *United Airlines* v. *Public Utilities Commission*, 37 Cal.2d 1 (1952), *appeal dismissed for want of a substantial federal question*, 342 U.S. 908. The Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 was very specific and clear on this point, and the preservation of the dual Federal-state airline regulatory system constitutes a deliberately adopted, firmly entrenched policy of the Congress:

> "Attention has been called to numerous recommendations and bills presented to Congress, prior to and since the enactment of Civil Aeronautics Act of 1938, seeking to extend Federal economic regulation to include intrastate operations of air carriers, and also to the fact that none of these has been enacted into law. [Citing Reports.] This would seem to strengthen the conclusion that Congress has not assumed control over [even interstate] carriers to the exclusion of State control as to their intrastate rates." *People* v. *Western Air-*

lines, 42 Cal.2d 621, 268 P.2d 723, 737 (Cal. Sup. 1954), *appeal dismissed for want of a substantial federal question*, 348 U.S. 859.

Of course, Congress reaffirmed this policy when it adopted the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301 et seq., preserving the same dual regulatory system as created in 1938.

Petitioners concede on page 51, footnote 30, of their Petition that: "In effect, the TAC is the CAB of Texas." As such, the TAC has equivalent powers to designate the airports to be served by its intrastate carriers. This, as Mr. Newman admitted, is essential:

> "A. The FAA has no function as far as designation of routes, whether intrastate or interstate, our only concern that involves the intrastate part of it is the safety aspect.
>
> "Q. Within the state or purely intrastate traffic, a coherent, systematic plan is necessary, just as it is within the nation, is it not?
>
> "A. That's correct." (R. 156-57)

At the trial herein, Mr. Newman frankly acknowledged that, with FAA approval, the Cities were attempting to exercise route making authority over Southwest, although he conceded the CAB would have this power as to interstate carriers and that, "intrastate or interstate, our only concern is the safety aspect." (R. 949; 586-87) The Cities, in turn, admitted that they claimed the power to determine public convenience and necessity with respect to Southwest, although their pleadings relied on exclusive CAB jurisdiction. (R. 919; Resp. App. D) Evidently, all of the Petitioners, and Mr. Newman, deemed preemption by the FAA of route making authority under the 1946 and 1970 airport grant statutes as an absurdity. (R.

588-89) They did not plead this contention nor present any evidence with respect thereto.

The Cities cannot usurp the powers of the TAC under Texas law, just as they cannot usurp the powers of the CAB under Federal law. There is an equally compelling demand for uniformity within each system in order to prevent chaos in either interstate or intrastate air transportation.

The Texas Constitution, Art. 11, Sec. 5, provides that Dallas, a creation of the State, may enact only ordinances which do not ". . . contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State. . . . ." Vernon's Ann. Civ. St. Art. 1165 sets forth an identical prohibition.

Under the Municipal Airports Act cited by Petitioners, Vernon's Ann. Civ. St. Art. 46d-1 through 46d-22 (Pet. App. D), Texas has expressly granted Dallas certain powers to regulate airports. These powers are, however, specifically circumscribed by the same Act:

> "(b) Conformity to Federal and State law. No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States *or laws of this State*, or *to any regulations promulgated or standards established pursuant thereto.*" (emphasis added) Art. 46d-7(b).

The opinions of the District Court and Court of Appeals herein (Pet. App. A & B) succinctly and conclusively set forth why Dallas' 1968 Ordinance is inconsistent with the Texas Aeronautics Act, Vernon's

Ann. Civ. St. Art. 46c-1 et seq., which preempts the intrastate field by delegating to the TAC the sole and exclusive authority to determine airport points of service in the interest of an "intrastate air transportation system" serving the public convenience and necessity of all of the citizens of Texas; with Southwest's certificate of public convenience and necessity which authorizes it to serve Dallas through "any" airport in the area and which is identical, in effect, to the unamended CAB certificates permitting the CAB carriers to use Love or any other airport, as they have done since the opening of DFW; and with Minute Order No. 22 of the TAC which forbids Southwest to change airports without prior approval by the TAC. *City of Arlington* v. *Lillard*, 116 Tex. 446, 294 S.W.2d 829 (Tex. Sup. 1927); *City of Fort Worth* v. *Lillard*, 116 Tex. 509, 294 S.W. 831 (Tex. Sup. 1927); *National Airlines, Service to Fort Lauderdale*, 41 CAB 85,108 (September 18, 1964); *Op. of Texas Atty. Gen.*, September 2, 1969 (Texas Aeronautics Act "subordinates, so far as for-hire air transportation is concerned, the general power of cities to regulate commerce within their boundaries").

Petitioners denigrate the TAC, which is currently supervising the FAA's Texas airport system planning and which has provided far better air service at lower fares for the people of Texas, and impliedly suggest that the Cities and the FAA are better judges of public convenience and necessity. This is somewhat incongruous in light of the evidence herein that neither the Cities nor the FAA paid any attention to public convenience and necessity and that the Cities, at least, would willingly and thoughtlessly destroy Southwest's competitive air service solely for the economic benefit

of the CAB air carriers, who have now kept Southwest locked in continuous litigation for almost seven years.

More specifically, Petitioners collaterally attack the adoption of Minute Order No. 22, which is the equivalent of Sec. 202.3 of the CAB Regulations providing that a CAB air carrier may not switch airports without notice to the CAB, nor without a hearing if the CAB finds that the proposal may be adverse to the public interest. *Flying Tiger Line, Inc., Air Truck Service*, 30 CAB 242, 243 (f.n. 1) (November 12, 1959). Minute Order No. 22 is a general regulation of the TAC applying to all Texas intrastate carriers, and, under both Texas law and the United States Constitution, no notice and hearing is necessary prior to the adoption of such administrative "legislation." *Bowles* v. *Willingham*, 321 U.S. 503; *Greer* v. *Railroad Commission of Texas*, 117 S.W.2d 142 (Tex.Civ.App.—Austin 1938, writ dism'd). If Petitioners wished to challenge Minute Order No. 22, they had, but have not exercised, the right to do so under Art. 46e-6, Subd. 3(e) of the Texas Aeronautics Act, Vernon's Ann. Civ. St., and Rule 49 of the Rules of Practice and Procedure of the TAC. Additionally, there is no evidence that Petitioners did not receive and the opportunity to be heard.

Petitioners also assert that Southwest's service to Love Field creates an undue burden on interstate commerce. This cannot be so since Southwest carries no freight or passengers in interstate commerce. It carries solely intrastate passengers and freight pursuant to authority granted by the TAC, in the exercise of powers preserved to it by the Federal Aviation Act of 1958. Petitioners do not like Southwest's competition with the CAB air carriers, but this competitive effect

hardly compares with the state burdens imposed by setting rates for intrastate passenger travel and freight shipments on interstate railroads (*Simpson* v. *Shepherd*, 230 U.S. 352); and taxing the full, unapportioned value of airplanes used in interstate commerce by a domiciliary interstate air carrier (*Northwest Airlines* v. *Minnesota*, 322 U.S. 292).

Before the District Court and on appeal, Petitioners contended they were entitled to declaratory relief because, as Home Rule cities under Texas law, they, rather than the TAC, possessed the authority to determine whether Southwest should be permitted to utilize Love Field. Both the District Court and Court of Appeals having decided against them on this issue, Petitioners now adopt the extraordinary position before this Court that the Court of Appeals exceeded the proper scope of judicial review by deciding the very questions of state law urged upon it by Petitioners.

A Federal court, having properly obtained jurisdiction, has the right to decide all the questions in a case. In many instances, in fact, it may be preferable to decide the case by construing a state statute rather than unnecessarily deciding the various constitutional questions appearing in the record. *Silver* v. *Louisville & Nashville Railroad Co.*, 213 U.S. 175.

Petitioners, however, maintain that the abstention doctrine enunciated by the Court in *Railroad Commission of Texas* v. *Pullman*, 312 U.S. 496, required the Court of Appeals to decide this case on the basis of Federal, rather than state, law. The *Pullman* case and its progeny evidence no such preference. Under the abstention doctrine, the Federal court refrains from exercising jurisdiction *at all* in circumstances in which

a state court could dispose of the case by ruling on a controlling question of state law; Federal-state conflict is thus avoided by having the Federal court abstain from reaching any constitutional issues. Since the doctrine involves duplication of effort and expense and an attendant delay, in the absence of special circumstances it "is not to be used to impede the normal course of action where federal courts have been granted jurisdiction in the controversy." *Propper* v. *Clark*, 337 U.S. 472, 492. Surely the Petitioners, having initiated this entire litigation by invoking the jurisdiction of the Federal courts, cannot seriously ask this Court to order the lower courts to abstain from this controversy, especially since Petitioners have alleged no reasons to justify the non-exercise of Federal jurisdiction.

The issues involving Texas law were thoroughly briefed and argued on the merits and were presented on a clear and complete record at the trial and appellate level. The rulings on these issues were made by a Texas Federal judge of long experience and by a Circuit Court which is constantly required to pass upon questions of Texas law. The author of the appellate decision, Judge Gee, possesses extensive experience in Texas jurisprudence as a resident and attorney of that state. Petitioners having failed to demonstrate that the lower courts' interpretation of local law is unreasonable, the Court should decline to review such decisions made by Federal courts skilled in the law of Texas. See *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280.

Recognizing that the FAA as a regulator of safety, the CAB as a regulator of only interstate air transportation, and Dallas as a non-regulator cannot supersede the TAC and displace Southwest from Love, Petition-

ers attempt to salvage their case before the Supreme Court of the United States by invoking the non-pleaded doctrine of preemption under the Federal Airport Act, ch. 251, 60 Stat. 170 (1946) and the Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1701 et seq. Both of these Acts provide only for grants in aid of local airport development and neither of them confers any regulatory powers upon the FAA. The Federal Airport Act of 1946 ("the 1946 Act") will be first examined because DFW received its initial grants and "long term" FAA commitment under this Act, and its scheme for local airport development is identical in all relevant aspects with that of the Airport and Airway Development Act of 1970 ("the 1970 Act").

The 1946 Act provides that the Administrator of the then Federal Aviation Agency (hereinafter "FAA" interchangeably with the Federal Aviation Administration) shall prepare a National Airport Plan for the development of a system of public airports adequate to anticipate and meet the needs of civil aeronautics, and that each fiscal year the Plan shall be revised and the proposed program of airport development publicly announced, although the Administrator "may revise such program to the extent he finds necessary." 49 U.S.C. Sees. 1102-03. Any public agency, or several acting jointly such as Dallas and Fort Worth, may file a project application for Federal funds, but this may not propose any airport development other than that "included in the then current revision of the national airport plan formulated by the Administrator under this chapter." 49 U.S.C. Sec. 1108(a).

Nothing in the 1946 Act "shall authorize the submission of a project application by any municipality . . .

which is subject to the law of any State if the submission of such project application . . . is prohibited by the law of such State." 49 U.S.C. Sec. 1108(b). The project will be approved by the Administrator only if he is satisfied, *inter alia*, "that the public agency or agencies which submitted the project application have legal authority to engage in the airport development as proposed." 49 U.S.C. Sec. 1108(d)(1). Public hearings are afforded only "with respect to the *location* of any airport the development of which is proposed." (emphasis added) 49 U.S.C. Sec. 1108(e).

As a condition precedent to his approval of a project, the Administrator must receive satisfactory assurances in writing: (1) that the airport involved will be available for "public use on fair and reasonable terms and without unjust discrimination"; (2) that it will be "suitably operated and maintained"; (3) that the "aerial approaches" will be safe; (4) that the airport will be available for use "by military and naval aircraft"; (5) that the sponsor will furnish space for Federal activities such as "air traffic control"; (6) that accounts and records will be kept in accordance with a prescribed system of accounting; (7) that the owner or operator will submit such financial and operations reports as are reasonably requested; and (8) that all airport records will be available for inspection upon reasonable request. 49 U.S.C. Sec. 1110.

Upon approving a project, the Administrator shall transmit an offer to the sponsor to pay the United States' share of the project costs, which "shall be made upon such terms, and subject to such conditions, as the Administrator may deem necessary to meet the requirements of this chapter and the regulations prescribed thereunder." Each such offer "shall stipulate the ob-

ligations to be assumed by the sponsor or sponsors of the project," and, upon acceptance, "shall comprise a grant agreement constituting an obligation of the United States and of the sponsor or sponsors so accepting." 49 U.S.C. Sec. 1111.

The 1966/1967 National Airport Plan for FY 1968-1972 states, on page eleven, that: "National airport planning requires the advice and participation of other Federal agencies in order to insure the compatibility of airport development . . . with airline service regulatory decisions." Under the heading "COORDINATION WITH THE CIVIL AERONAUTICS BOARD," contained on page twelve, it recites:

> "The interrelationship of the responsibilities of the CAB and the FAA concerning airports emerges from the mandate of the Federal Aviation Act of 1958 to encourage and develop an air transportation system properly adapted to current and future needs of air commerce. *The Board is empowered to determine which communities shall receive airline service and to regulate the airline route structure to meet this public need. In this connection, the Board may designate the airport through which airline service is to be provided to a community. Generally, the Board leaves the selection of the airport to airline management as long as it satisfies the public convenience and necessity.* The FAA is charged with the development of a national system of airports to anticipate and meet the needs of civil aeronautics. *Since the composition of the airport system is in substantial measure based on the requirements imposed by the operation of the airline aircraft fleet, it is essential that the Plan be based on a thorough knowledge of the locations being served by air carrier aircraft and their projected future public service.*

> *The interrelationship of certificate authority and airport capability, therefore, dictates that the FAA and CAB coordinate their respective activities. . . .*" (emphasis added)

The FAA thus concedes that under the 1946 Act, as well as under the 1970 Act, it has no power to govern service of airports by airlines. See also, to the same effect, the narrative preceding the *1972 National Airport System Plan*, Volume AAS. By Congressional edict, this power resides in the CAB with respect to interstate air transportation and, although ignored in the FAA's narrative, in the TAC with respect to intrastate air transportation. The notation on page 186 of the 1966 67 Plan, "To Ultimately Accommodate All Airline Service," merely identifies DFW's proposed "principal role" (p. 39); is not intended to have any regulatory effect; and is obviously based on the unfounded assumption that the CAB would carry out its interlocutory order in the Dallas-Fort Worth Regional Airport Investigation and amend the certificates of its air carriers so as to require them to provide all Dallas Fort Worth service through DFW.

Order No. 5190.6, "Airports Compliance Requirements," adopted by the FAA on August 24, 1973, three years after enactment of the 1970 Act, also makes perfectly clear the limited role of the FAA as an airport grant program administrator:

> "1. GENERAL. The airport compliance function is not regulatory. It does not attempt to control and direct the operation of airports. . . .
>
> "Such grants were made in exchange for binding commitments designed to assure that the public interest would be served. The FAA bears the

important responsibility of seeing that these commitments are met. . . ." P. 1.

* * *

"4. SOURCES OF OBLIGATIONS. The obligations that airport owners assume in consideration of Federal aid flow from the following agreements and statutes which are described in Chapter 2.

"a. Grant agreements issued under the Federal Airport Act of 1946 or the Airport and Airway Development Act of 1970." P. 2.

* * *

"SECTION 1. THE FAA COMPLIANCE PROGRAM

"76. BASIS AND OBJECTIVES. . . . FAA airports personnel must make it clear to airport owners that they do not seek to enforce a regulation but to administer a contract in the interests of civil aviation. . . ." P. 71.

Thus, the FAA concedes that it has no regulatory authority at all under either the 1946 or 1970 Acts and that its sole responsibility is to enforce contractual commitments undertaken by sponsors pursuant to such Acts.

Finally, as it emerged from Committee in both the Senate and the House, the original version of 49 U.S.C. Sec. 1716(f), part of the 1970 Act, would have empowered the Secretary of Transportation, under certain circumstances, to select sites for additional airports in metropolitan areas. Other sites would be ineligible for Federal funds as long as the Secretary's designation remained outstanding, and this was the only coercive imposition on local interests under the Act as proposed. Nevertheless, even this was too strong for the House and Senate, which jointly amended 1716(f) to its present form: "In order to facilitate the selection of a site for an additional airport under the preceding sentence, the Secretary shall

exercise such of his authority under this subchapter as he may deem appropriate to carry out the provisions of this paragraph." His "authority under this subchapter" was variously described by the Senate and House sponsors of the amendment as "to persuade and influence" but not to interfere with "the basic responsibility" of "the governing local authorities;" "to seek to use persuasion;" and "to help facilitate a decision." 116 Cong. Rec. 4869; 115 Cong. Rec. 33278. See also 116 Cong. Rec. 4869-70 and 5035.

It is obvious that the 1946 Act and the 1970 Act are in no sense regulatory enactments intended by Congress to preempt any field. They are simply grant statutes setting forth the conditions upon which aid will be rendered to local bodies in the development of their airports. The Acts do not even operate except upon the initiative of a local public agency in applying for funds. If such public agency does not comply with the Acts, Federal funds are denied, but it can proceed to undertake and complete any development it wishes with its own resources. The National Airport Plan and the National Airport System Plan are just that—plans, without any affirmative effect at all. Their sole purpose is to assure that Federal funds, if granted, will be employed in an orderly manner consistent with a national scheme and not be squandered on individual projects without priority ranking or interrelationship. Such Plans are also, of course, designed to lure public agencies into making specific improvements by holding forth the promise of Federal funds if certain projects are undertaken rather than others. But it is undeniable that such Plans serve only as guidelines for Federal expenditures, and no more.

The FAA did not impose any restrictions upon the use of DFW in its grant agreements and certainly

could impose none upon Love Field, which was not the subject of the grants. The FAA Administrator constantly revises the National Airport System Plan and enters designations as to the anticipated, future "principal role" of an airport. But this is done without notice or hearing and on the basis of information furnished *to* him; not on the basis of any independent factual determination made *by* him. For instance, the 1970 National Airport System Plan lists Love as a Basic Transport Airport (*designed* for 60,000 pounds maximum gross weight) for five years and then a General Transport Airport *designed* to accommodate aircraft up to 175,000 pounds. Volume AAS, p. 25. This is despite the fact that Love has just ceased serving as the sole commercial aviation airport in the Dallas/Fort Worth area, receiving, every day, 747's, DC-10's, and L1011's weighing over 300,000 pounds, as it will continue to do in connection with charter operations, maintenance flights, unscheduled cargo flights and other commercial and non-commercial aeronautical activities sanctioned at Love by the 1968 Ordinance. As stated on page 29, "Implicit in this process are *assumptions* about level of service and projected activity at airports included in the NASP." The 1972 National Airport System Plan also shows that no FAA approved Master, Metropolitan, Regional, or State Plan is yet in effect for Love Field, Volume ASW, Southwest Region, pp. 2 and 36, completely disproving that Love fulfills an assigned role in any local airport system plan yet evolved. Moreover, Sections 1711(4) and (5) of the 1970 Act define airport master and system planning as being only for "purposes of information and guidance."

Neither the 1946 Act nor the 1970 Act expressly preempts the field of route making in connection with airport grants. But Petitioners would have this Court be-

lieve that through these Acts Congress impliedly intended to do away with the dual Federal-state airline economic regulatory system it deliberately established in the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, persistently refused to change, and expressly reconfirmed in the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301 et seq., enacted twelve years after adoption of the 1946 Act. Furthermore, this modification of the entire Federal and state regulatory machinery was supposedly accomplished by mere grant in aid statutes, originally designed to last for only seven years and allegedly providing that airlines may be switched from airport to airport as the Administrator singlehandedly, and unbeknownst to them, periodically revises the National Airport System Plan by updating his files and making notations on pieces of paper.

Petitioners' contention exacts Federal-state uniformity in the field of airline service regulation, which the Congress has expressly determined requires Federal-state diversity; it predicates preemption upon a non-regulatory and totally non-pervasive scheme designed solely to determine eligibility or ineligibility for Federal aid; and it converts a field in which Federal dominance has traditionally and specifically been rejected into a field where an agency never deemed to function, the FAA, suddenly exerts supreme Federal powers without any standards or procedures for doing so, all contrary to *Cooley* v. *Board of Wardens*, 12 How 299, 13 L.Ed. 996 and *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218.

Finally, the unarticulated logic of Petitioners' preemption argument contains self-destructive incongruities. If the 1946 and 1970 Acts preempted the field of airport operations with respect to designating

airline service points, does the FAA now regulate intrastate air carriers and the CAB interstate air carriers? If so, can the FAA order its intrastate carriers to serve DFW while the CAB permits its interstate carriers to serve Love Field, or does this create forbidden unjust discrimination on the part of the Federal government? In the event of such a conflict, which now exists according to the Petitioners, does the FAA or the CAB prevail? Or perhaps the FAA's powers in this respect were intended by Congress to supersede those of the CAB, in which event are there to be two route hearings on every Federal application, one before the CAB to determine whether a city should be served and another before the FAA to determine which airport in that city should be served, if any? Suppose the CAB authorizes service to Chicago, but the FAA refuses to permit landings at any of its airports? Or perhaps the Congress intended the FAA to take over the CAB's entire route making authority but forgot to repeal Title IV of the Federal Aviation Act of 1958? And what of the remaining role of the States, if any? Does the TAC regulate all aspects of Southwest's operations except airport service points, which are regulated for intrastate carriers by the FAA and for interstate carriers by the CAB? Should Southwest have simultaneously applied to the TAC for authority to carry only Texas intrastate passengers to and from Dallas and to the FAA for permission to enplane and deplane them at Love Field, the only airport suitable for a strictly short haul commuter carrier?

Petitioners' preemption argument is completely unfounded and, if accepted, would make hash of a finely crafted Federal-state regulatory scheme. The District Court and the Court of Appeals properly rejected this bizarre argument and their decisions are correct.

II

THERE IS NO CONFLICT OF DECISION

Petitioners assert that the decision below is in direct conflict with *United States* v. *City of New Haven*, 496 F.2d 452 (2nd Cir. 1974), *appeal filed sub nom. Town of East Haven* v. *United States*, 43 U.S.L.W. 3124 (U.S. July 30, 1974, No. 74-37), *appeal dism'd and cert denied*, 43 U.S.L.W. 3255 (October 29, 1974). The two cases are completely unrelated.

To insure safe landings and takeoffs, FAA regulations require that the ground level area beyond the runway be clear of all structures that might interfere with low-flying aircraft. To provide such a "clear zone," New Haven purchased additional land, which was located in the neighboring Town of East Haven.

The Superior Court of Connecticut held that this land acquisition violated state law because New Haven had failed to obtain East Haven's permission prior to acquiring its land. On that basis, the Superior Court enjoined the expansion of the airport over East Haven with respect to the "maintenance of clear zones." The United States then instituted suit in the United States District Court for the District of Connecticut seeking to enjoin enforcement of the state court order, to the extent that it regulated the flight of aircraft through the navigable airspace. The District Court granted a preliminary injunction, which was affirmed in *City of New Haven*. Thereafter, the preliminary injunction was made permanent.

The state court's order forced New Haven to close a portion of its Federally-financed runway. Consequently, pilots of Eastern Airlines refused to fly jet aircraft into or out of Tweed-New Haven Airport.

(Ct. App. Appendix 40a) A more drastic interference with the FAA's power to regulate the navigable airspace in the interests of safety can hardly be envisioned.

Congress has enacted a detailed and comprehensive system of air traffic regulation. In the Federal Aviation Act of 1958, 49 U.S.C. 1301 et seq., Congress expressly stated that the United States possesses and exercises "complete and exclusive national sovereignty" in its airspace. 49 U.S.C. 1508(a). "Navigable airspace" is defined to include "airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. Sec. 1301(24). This constitutes the "clear zone." To the extent, therefore, that the state court order regulated, and interfered with, the flight of aircraft through the navigable airspace, it clearly violated the Supremacy Clause. *United States Constitution*, Art. 6, cl. 2.

The decision in *City of New Haven* in no way relies on preemption under either the Federal Airport Act, ch. 251, 60 Stat. 170 (1946) or the Airport and Airway Development Act of 1970. 49 U.S.C. Sec. 1701, et seq. It in no way involves economic regulation of points of service by air carriers. It is in no way related to the issues in this case. Instead of establishing "complete and exclusive national sovereignty" in the regulation of air carrier service, Congress has intentionally and specifically ordained that the CAB shall determine and regulate the routes of interstate air carriers and that the states shall perform the identical function with respect to intrastate airlines.

Petitioners also claim that there is at least a conflict in principle with the decision of this Court in *Burbank*

v. *Lockheed Air Terminal*, 411 U.S. 624. This is also insupportable.

Burbank involved the power of the City to enforce an ordinance imposing a curfew on take-offs of pure jet aircraft at Hollywood-Burbank Airport. The purpose of the ordinance was to eliminate jet aircraft noise between the hours of 11 p.m. and 7 a.m. Although the majority touched upon regulation of the use of navigable airspace (as to which there are no problems at either Love or DFW), it concentrated upon the pervasiveness of the Congressional scheme enacted in the Noise Control Act of 1972, 49 U.S.C. Sec. 1431, in finding preemption. The dissent concluded that Congress had not intended to preempt and that, in any event, the FAA had not occupied the field with any pervasive or conflicting noise control regulations.

Under the 1946 and 1970 airport aid Acts relied upon by Petitioners, the FAA has only the power to determine eligibility; to enter into grant agreements; and to police the observance of those agreements. It does not have the power to regulate the use of navigable airspace; to adopt regulations pertaining to air carriers; or to control airport operations and usage in any manner. Not only is there no pervasive scheme, there is no regulatory scheme at all, and the FAA has never attempted to adopt one, expressly recognizing the non-existence of any regulatory power on its part. This case concerns only state regulation of airline economies in the interest of public convenience and necessity, a field which Congress has expressly declined to preempt.

III

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

1. The only evidence in the record of any "authoritative" FAA attitude towards Love Field service by scheduled carriers consists of a purported conversation between Gen. McKee, the FAA Administrator in 1965, and Mr. Henry L. Newman, FAA Director for the Southwest Region. Moreover, Petitioners' claim of preemption under the 1946 and 1970 Acts is not invoked in their pleadings. (Resp. App. D) Thus, the record hardly justifies review by this Court of Petitioners' preemption argument. Even if the Court should feel it probable that the 1946 and 1970 airport aid Acts impliedly repealed or modified the dual Federal-state regulatory system set forth in the Federal Aviation Act of 1958, the only result would be an inconclusive remand for further trial on the issue. See *United States* v. *Abilene & S. Ry. Co.*, 265 U.S. 274.

2. The only public interest factor in this case requires the maintenance of Southwest's service at Love so that it can continue to provide superior air service at lower fares and not be expunged by the CAB air carriers. These carriers are underwriting all DFW deficits so that the financial well-being of their airport and of the citizens of Dallas and Fort Worth is not affected by the outcome of this matter. A clear distinction must be made between the financial interests of the CAB air carriers and the welfare of the public as reflected in public convenience and necessity determinations.

3. Petitioners fail to specify the manner in which the result in this case will affect other airport projects.

Additionally, the Airport and Airway Development Act of 1970 was funded for only five years and will be reviewed, and possibly changed or repealed, by Congress in 1975. Therefore, any decision as to its meaning and effect may have little precedential value. Furthermore, the Secretary of Transportation has announced that DFW will be the last "super airport" project and that increased use of Love should be encouraged. DOT and FAA obviously regard this case as of little consequence, since neither of them have ever attempted to intervene and be heard herein.

Petitioners' stated concern is that Southwest's CAB competitors, Braniff and TI, may be induced to provide service from Love as a result of Southwest's remaining there (the so-called "domino theory"). American and Delta Airlines are presently suing Petitioners, as well as Braniff and TI, in the United States District Court for the Northern District of Texas in order to enforce the intent of the Letter Agreements requiring each CAB air carrier to transfer all of its scheduled air services to DFW, and the trial is scheduled for February 10, 1975. If American and Delta are successful, as they should be, the outcome of this case in this Court will have little or no meaning even to the parties directly involved.

Petitioners' mistake was to ignore the TAC and to assume that only CAB action was required with respect to scheduled air carrier service. Presumably, this mistake will not be repeated by other airport sponsors in the future. This case simply does not involve any important principles stretching beyond the particular facts and parties involved.

4. Petitioners contend the 1946 and 1970 Acts preempt state action by the TAC. They ignore the dire

consequences flowing for them from acceptance of their argument. The FAA has never acted in an effective regulatory manner to ban Southwest from Love Field, so that Southwest may continue to serve that airport until it receives notice and hearing pursuant to which a final, adverse decision is rendered. But if TAC action is preempted, then so is the attempt by the Cities to regulate airport usage under their 1968 Ordinance and its later counterparts, pursuant to which over $400,000,000 in bonds were issued. These ordinances and, consequently, the bonds they authorized, would be invalidated along with Southwest's certificate and Minute Order No. 22. Even if the ordinances were severable, at the very least the bondholders would have an excellent action for rescission on the grounds that they had been misled by omission of information.

5. Assuming the Court agreed with the Petitioners as to the significance of their preemption argument, it would be unable to reach this issue as a basis for decision:

a. Petitioners claim that the CAB air carriers will suffer unjust discrimination if Southwest is permitted to serve Love while they must serve DFW. This claim is obviously fallacious since, if those carriers have lost their right to serve Love, it is only through their own, voluntary contractual undertakings (the Letter Agreements) and not as a result of any arbitrary fiat. As stated by Judge Taylor below: "If the potential user cannot, or does not, choose to avail itself of the 'opportunity' to use the airport, the airport operator is obviously not required to exclude those who can and do choose to use such facilities." (Pet. App. 126) It would, however, clearly constitute unjust discrimination against Southwest for the FAA to exclude it from

Love, when the CAB has expressly declined to take such action as to its own carriers. This is especially so since Southwest, as a strictly short haul commuter carrier, has most need for use of the close-in airport facilities.

b. Petitioners contend that if Southwest were excluded from Love, then only general aviation would be permitted to use that airport. This is untrue, as the record amply demonstrates. But even assuming its truth, such a restriction would not only constitute unjust discrimination against Southwest's passengers and its preferred commercial airline service, in favor of the less necessitous rights of general aviation, but would also violate the prohibition against the grant of an "exclusive right" to use of an airport, contained in the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1349(a). *Aircraft Owners and Pilots Ass'n v. Port Authority of New York*, 305 F.Supp. 93 (E.D.N.Y. 1969); 40 Op. A.G. 71 (June 4, 1941). The City of Fort Worth admitted in its brief to the CAB in the Regional Airport Investigation that it was illegal to exclude even less preferred general aviation from an airport, and the Executive Director of DFW has conceded that this is so, which is the reason why general aviation will be permitted to use the DFW facilities. (R. 4896-99; 843)

c. Three series of Love Field Airport Revenue Bonds, of which approximately $9.5 million are outstanding, provide that while any of them remain unpaid, Dallas "will continue to operate and maintain . . . the Airport as an airport for the accommodation of scheduled airlines serving the City . . . ." (R. 4476; 4575; 4657-58; 1861-62) Four series of Love Field Maintenance Base Bonds, of which some $25 million

are outstanding, provide that so long as any of such bonds remain unpaid "The City will continuously operate its Airport at Love Field, and will not cause or suffer curtailment of the general use thereof . . . ." (R. 4727; 4788; 4821; 4851; 1861-62) Dallas may not ignore or evade the restrictions of these covenants. *City of Houston* v. *Mann*, 164 S.W.2d 548 (Tex.Sup. 1942). Thus, insofar as the 1968 Ordinance is relied upon, as the only regulatory action ever taken by any governmental body to control use of Love, it is illegal Southwest is entitled to raise this issue because it owns both Love Field Airport Revenue Bonds and Love Field Maintenance Base Bonds, which constitute enforceable contracts between it and Dallas.

d. Even if the FAA did have regulatory powers under the 1946 and 1970 Acts and had exercised them through anomalous notations on the National Airport Plan or by delegation to Dallas, as Petitioners inferentially contend, its unilateral actions, without notice and hearing, would, as to Southwest and its passengers, violate the Administrative Procedure Act, 5 U.S.C. Secs. 554 and 556 and the Fifth and Fourteenth Amendments to the United States Constitution; 49 U.S.C. Sec. 1374(b); the equal protection clause; the right to travel; the right of access to the navigable air-space; and would discriminate against Southwest's passengers on the basis of wealth, as corporate jets could use downtown Love Field for their convenience, but not Southwest's reduced fare commuting public.

CONCLUSION

This case has nothing to do with airspace management, noise or safety matters, and thus has no relationship to the areas where this Court has concluded that

the FAA has been given preemptive powers. The 1946 and 1970 Acts relate only to the disbursement of Federal funds for local airport development upon application therefor by local agencies. The National Airport Plan and the National Airport System Plan, as revised from time to time by the Administrator of the FAA, have no regulatory effect and are simply guidelines for the expenditure of Federal funds in a systematic manner according to priorities established by the FAA.

DFW originated in the CAB's interlocutory decision that the new economies of jet aircraft, as linked to considerations of public convenience and necessity, required that its carriers serve only one airport in the Dallas Fort Worth area, rather than two airports but twelve air miles apart. Under the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301 et seq., however, the CAB can make these decisions only for interstate air carriers, and it has since concluded that not even they should be restricted to DFW. The power to determine public convenience and necessity for intrastate carriers, including, most specifically, the power to determine airport points of service, is expressly left to the states in which such carriers operate.

It is clear under Texas law that only the State, through the TAC, can determine issues of public convenience and necessity relating to the intrastate system of air transportation. If it were otherwise, 200 Texas cities with municipal airports would be enabled to fragmentarily regulate, and thereby destroy, the intrastate system, thus creating, within Texas, exactly the type of problem which the majority in the *Burbank* case visualized as resulting, on a national scale, from city curfew ordinances. Just as the Federal Aviation Act

of 1958 has preempted state control of interstate air transportation, so the Texas Aeronautics Act, Vernon's Ann. Civ. St. Art. 46c-1 et seq., has preempted city control of intrastate aviation. Unitary regulation under, respectively, the Federal and State Supremacy Clauses, is essential to the efficient functioning and integrity of both airline transportation systems.

This case involves no issue beyond the squabbling among the CAB air carriers as to their respective portions of DFW expenses, an airport which, for better or worse, they built to suit their own economic requirements and needs for transcontinental aircraft facilities.

For all reasons stated herein, Respondent Southwest Airlines Co. respectfully submits that a writ of certiorari should be denied.

Respectfully submitted,

HERBERT D. KELLEHER
Oppenheimer, Rosenberg,
Kelleher & Wheatley, Inc.
Suite 620, 711 Navarro
San Antonio, Texas 78205

JOHN L. HAUER
Akin, Gump, Strauss, Hauer
& Feld
2800 Republic National
Bank Building
Dallas, Texas 75201

Attorneys for Respondent,
Southwest Airlines Co. and
Members of the Bar of the
Supreme Court of the United
States

APPENDIX

APPENDIX A

Order No. E-18719

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the 20th day of August, 1962

DOCKET 13959

In the matter of

DALLAS-FORT WORTH, TEXAS
REGIONAL AIRPORT INVESTIGATION

Order Instituting Investigation

The Civil Aeronautics Board has become increasingly concerned in recent months with the use or establishment of separate air carrier airports for service to cities which appear to warrant service through a common airport. The Board believes that in many such instances the use of multiple airports by the scheduled airlines tends to diminish the services to each airport and increase the cost of air transportation. Contrariwise, the concentration of services at one airport will often result in improved air service without serious ground service inconvenience to the users.

Our concern in this regard has already led to the institution of a series of investigations relating to consolidation of air services for specific areas at a single airport.[1] We have also undertaken in other situations to point to

---

[1] *New England Regional Airport Investigation*, Docket 13494; *North Central Area Airline Service Airport Investigation*, Docket 13743; *Greensboro-High Point/Winston-Salem Service Through A Single Airport*, Docket 3496; *Service to Ogdensburg, N. Y. Case*, Docket 13335.

the public interest in concentrating air service for several communities at a single airport.[2] Our stress on the desirability of consolidating air service for closely located communities is a vital part of our effort to assist the air transportation industry to realize the full economic potential of its greatly expanded capacity in new high performance equipment without resulting in inconvenience to the users and without adversely affecting the public interest. Consequently, we intend systematically to focus on each situation in which there is a potential public interest in providing service to closely located communities through a single airport.

It is, therefore, understandable why our attention should be drawn to the question of whether scheduled air service to Dallas and Fort Worth should be rendered through a single airport. These communities, which are less than 31 miles apart, have long been concerned with the question of the airport through which they would receive air service. In recent years, the effort on the part of the communities has been to obtain or retain a full pattern of air services to meet their individual needs.[3] In fact, there is currently pending before the Board a further proceeding involving questions of adequacy of air service at Fort Worth. These proceedings have been premised on the assumption that these communities should receive air service through separate airports. In this, they were consistent with the policy guidelines which had their grounding in

---

[2] *Piedmont Local Service Area Investigation*, Docket 5713, *et al.*, Order E-18123, pp. 12-14; *Pacific Southwest Local Service Case*, Docket 5645, *et al.*; *Southern Transcontinental Service Case*, Docket 7984, *et al.*, Order E-16860 and Order E-17651; *Service to Sheboygan and Manitowoc, Wisconsin Area*, Docket 9767; *Southern Airways "Use It Or Lose It" Investigation and Route Realignment*, Docket 13564.

[3] *Fort Worth Investigation*, Docket 7382.

the economics and operations which preceded the advent of the new jet equipment.[4]

We have, however, not as yet focused fairly on the question of whether Dallas and Fort Worth should be served

---

[4] In the memorandum forwarded with its letter relative to Adequacy of Service Problems addressed to all air carriers and many civic bodies under date of May 5, 1961, in referring to past adequacy of service cases, the Board made the following statement, *inter alia:*

"An important problem indicated by those cases was the proximity of the complaining cities to a major air transportation center through which the air carriers provided a well-rounded pattern of service. This situation has been compounded during recent years through the development of longer range aircraft and the operational and economic problem of serving two cities as consecutive points when the distance between them is relatively short.

"The conversion by trunkline carriers from a piston-type fleet to a predominantly jet-powered fleet has made more complex the economic problems of air carriers; and for some cities certificated for trunkline service, has created, or may in the future create problems relating to through-plane service and schedule frequency. Many cities do not have airport facilities capable of handling jet operations. In other instances, where cities do have adequate airport facilities, the proximity to other cities with similar facilities may make the provision of a well-rounded pattern of jet service to both points economically unsound. With jet airliners almost doubling the capacity of piston-type aircraft, it is fundamental that in the near term the same frequency of service cannot be operated to every point as has been in the past.

"To enumerate all the problems from both the airline and the city standpoint which have arrived with the conversion to jet equipment would require many pages of detail. These are problems of which we are sure the recipients of this letter are only too well aware. There are, however, several suggestions which are worthy of consideration toward meeting some of these problems. The first of these is the creation of regional airports. In certain situations, in order that all communities within a given area might be assured of adequate jet transportation, it would appear necessary that the communities jointly decide which airport should be used, or in some instances, at what point a new airport can be constructed to better serve the needs of all."

through a single airport. As we have previously noted, we should in due course have undertaken such task as part of our national program. However, we have recently been apprised of the intention of both of these communities to invest substantial funds to meet the anticipated needs of increased air carrier services at airports which are only 12 miles apart. Since our resolution of this matter could have a decided effect on the need for enlarged facilities at one or both of the communities, it appeared incumbent upon us to advance the time for a review of this situation.

Accordingly, It Is Ordered:

1. That an investigation, to be known as the *Dallas-Fort Worth Regional Airport Investigation*, Docket 13959, be and it hereby is instituted pursuant to sections 204, 401 and 1002 of the Act, to determine whether the public convenience and necessity require the alteration, amendment or modification of the certificates of all air carriers authorized to serve either or both Dallas and Fort Worth, Texas, in such manner as to require that Dallas and Fort Worth be served through a single airport to be designated therein;

2. That a copy of this order shall be served upon the Cities and Chambers of Commerce of Dallas and Fort Worth, Texas, and upon American Airlines, Inc., Braniff Airways, Inc., Central Airlines, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., and Trans-Texas Airways, Inc., who are hereby made parties to this proceeding;

3. That the proceeding ordered herein be assigned for hearing before an examiner of the Board at a time and place hereafter to be designated;

4. That this order be published in the Federal Register.

By the Civil Aeronautics Board:

Mabel McCart
Acting Secretary

(Seal)

APPENDIX B

Order 73-9-82

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 21st day of September, 1973

DOCKET 13959

DALLAS-FORT WORTH REGIONAL
AIRPORT INVESTIGATION

Order Terminating Investigation

This investigation was instituted by the Board on August 20, 1962 (Order E-18719, amended on December 19, 1962 by Order E-19117), to determine whether the public convenience and necessity require the alteration, amendment, or modification of the certificate or certificates of (1) all air carriers, (2) the local service carriers, (3) the trunkline carriers, or (4) any individual air carrier or air carriers authorized to serve either or both Dallas and Fort Worth, Texas, in such manner as to require that Dallas and Fort Worth be served through a single airport to be designated in this proceeding.

After due notice a public hearing was held before Administrative Law Judge Ross I. Newmann, who thereafter issued his initial decision on April 7, 1964, in which he concluded that it would not be in the public interest to designate either GSIA or Love Field as a regional airport to serve the Dallas-Fort Worth area. Judge Newmann recognized, however, that both cities would benefit if a fair and equitable solution to their problems could be worked out. As a possible solution, he suggested the creation of an Airport Authority which would assume full

responsibility for the planning, development, and operation of all airports in the Dallas-Fort Worth area.

On September 30, 1964, the Board issued an order (E-21341) stating it was unanimously of the opinion that service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present and future requirements for transcontinental passenger and cargo services. The order gave the two cities a period of 180 days within which to arrive at a voluntary agreement concerning the location of the airport to be used for the consolidated service and to submit such agreement to the Board.

When the two cities failed to reach an agreement, the Board issued Order E-22028 on April 13, 1965, stating that it was firmly of the view that a voluntary agreement on the part of both cities is the best solution to their airport problem and that the Board was prepared to assist them in reaching such an agreement. The Board therefore remanded the case to the administrative Law Judge with full authority to assist the parties in their efforts to reach a definitive agreement.

Following our order of remand, the Administrative Law Judge held a series of meetings with representatives of both cities in Washington, D. C., Fort Worth, and Dallas. As a result, the Dallas Fort Worth Regional Airport Board was established on September 27, 1965, under Texas Revised Civil Statutes, and was given permanent status by the City Councils of Dallas and Fort Worth. On April 15, 1968, the cities signed a contract creating provisions for the construction and operation of the Dallas-Fort Worth Airport. Under the contract, the airport will be owned and operated by or on behalf of and under the control of the cities. The Board was authorized to plan, acquire, establish, develop, construct, operate, regulate, and police the airport, and was charged with the responsibility

of exercising on behalf of the cities the powers of each with respect thereto.

In its ultimate development the Dallas-Fort Worth Airport will have six primary instrument runways capable of three simultaneous operations, and a ground capacity of 230 passenger-aircraft gates and 200 all-cargo gates. Under Phase I, which is to be opened this fall, the Dallas-Fort Worth Airport will provide a three-runway layout capable of simultaneous aircraft operations, with a total of 66 passenger gates and 12 cargo gates. Phase I cost is estimated at approximately $700 million.

In view of the foregoing, we find that the new Dallas-Fort Worth Airport will provide an adequate facility to accommodate the air transportation needs of Dallas and Fort Worth and the surrounding counties that constitute their tributary market-base region. We further find that the primary purpose and objective of this investigation has been accomplished.

ACCORDINGLY, IT IS ORDERED THAT:

The investigation in Docket 13959 be and it hereby is terminated.

This order shall be published in the Federal Register.

By the Civil Aeronautics Board:

(SEAL)

EDWIN Z. HOLLAND
Secretary

APPENDIX C

AVIATION DAILY TUE. OCT. 8
1156 15th ST., N.W., WASHINGTON, D.C. 20005
TELEX 89-2447 202-293-3400
1974 VOL. 215 NO. 26

AIRPORT AID PROGRAM BECOMING HEATED ISSUE

Transportation Department is taking a close look at the Airport Development Aid Program (ADAP) to determine what it may want to *"change or throw out as a national policy"* according to Secretary Claude Brinegar. While saying the program is "clearly facing an extension" and that DOT is "not about to say no to ADAP," Brinegar said he has a group trying to determine the "pros and cons" of the program and find what has been accomplished in the years ADAP has been in existence.

Brinegar said ADAP has become an "increasingly hot policy issue." This view is similar to one expressed earlier by Sen. Howard Cannon (D-Nev.), who said *ADAP is expected to be the "biggest issue" next year before Cannon's aviation subcommittee* (DAILY, Aug. 7).

Brinegar said that the era of the super airports such as Dallas/Fort Worth is coming to an end. Greater emphasis will be placed on managing the capacity of existing airports "as best we can," he said. One way this could be done is by increasing use of airports replaced by giant airport complexes such as Chicago Midway and Dallas Love Field.

Brinegar also said of the cost allocation study that there is a "lingering desire" on the part of DOT to "make peace" with the study, to bring its issues into perspective. Problem is that DOT may end up with a departmental concept of cost allocation that does not fit into the "considerations of congressional wishes." While admitting

that DOT does not "honestly know" how financing of airports should be allocated, Brinegar said that he is studying worldwide cost allocation programs to see how this is done elsewhere.

Brinegar said FAA is a "strong and independent agency," and while there were some areas of disagreement between DOT and FAA the agency should be "left alone" in areas in which it is competent. Brinegar opposed the concept of some FAA functions being allocated to individual state aviation agencies. While he would like to see the states addressing the question of transportation planning, Brinegar said that the states do not have the centralized expertise that exists in FAA.

Aviation has become the number one priority within DOT because of the international situation, Brinegar said. About 50% of his time is now spent involved in the Pan Am-TWA problem, he said. Priorities are established in DOT by time required to handle crises within the different modes of transportation, Brinegar said, and the aviation problem is now "number one" in time consumption.

Post Office Drops Airtrans System At Dallas/Fort Worth

U.S. Postal Service discontinued use Friday of the Dallas/Fort Worth Airport Airtrans system for movement of air mail between aircraft and air mail facilities despite announcement by DFW that Airtrans is "revenue operational."

Airtrans use was discontinued after it "failed to live up to requirements," a USPS spokesman told The DAILY. Criteria established by the Postal Service had included delivery between aircraft and air mail facilities within one hour, a time period which is "as long or longer than any other airport in the country," the spokesman said.

Failure to meet the one-hour deadline occurred 15% of the time, said LTV Aerospace Corp., manufacturer of the

Airtrans system, with 11% caused by loading and unloading delays. The remaining 4% was caused by delay or malfunction of the Airtrans cars, LTV said.

Major loading and unloading delays were caused by unexpected increases in air mail volume by as much as 50%, due in part to use of air for first class mail and to miscalculation of peak hour expectations by two

(Continued On Following Page)

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS—DALLAS DIVISION

Civil Action, File No. CA-3-5927

THE CITY OF DALLAS, TEXAS, THE CITY OF FORTH WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Plaintiffs*,

v.

SOUTHWEST AIRLINES CO., *Defendant*

Complaint for Declaratory Relief

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, the City of Dallas, Texas, the City of Fort Worth, Texas, and the Dallas-Fort Worth Regional Airport Board, and each of them, and respectfully represent and allege as follows:

I.

a) Jurisdiction is founded on the existence of a Federal question and amount in controversy. The action arises under The Federal Aviation Act of 1958 (Public Law No. 85-726, 85th Congress, 2nd Session, 72 Stat. 731; 49 U.S.C. 1301 et seq.), as amended. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

b) Jurisdiction is founded on the existence of a question arising under particular statutes. The action arises under The Federal Aviation Act of 1958 (Public Law No. 85-726, 85th Congress, 2nd Session, 72 Stat. 731; 49 U.S.C. 1301 et seq.), as amended, as hereinafter more fully appears.

II.

This is an action for a declaratory judgment pursuant to 28 USC § 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

III.

Plaintiffs, the City of Dallas, Texas, and the City of Fort Worth, Texas, are municipal corporations of the State of Texas, duly organized and existing under the authority of Article XI, Section 5, of the Constitution of the State of Texas, the laws of the State of Texas, and by their respective Home Rule Charters.

IV.

In 1962, the City of Dallas, Texas, was the duly authorized owner and operator of Love Field, an airport providing facilities for scheduled air carrier service to and from Dallas, Texas, and vicinity, and the City of Fort Worth, Texas, was the duly authorized owner and operator of Greater Southwest International Airport, an airport providing facilities for scheduled air carrier service to and from Fort Worth, Texas, and vicinity.

V.

On August 20, 1962, the Civil Aeronautics Board, an agency of the United States Government, instituted an investigation under Docket No. 13959 (by Order No. E-18719, amended on December 19, 1962, by Order No. E-19117) to determine whether the public convenience and necessity required the alteration, amendment, or modification of the certificate or certificates of (1) all air carriers, (2) the local service carriers, (3) the trunkline carriers, or (4) any individual air carrier or air carriers authorized to serve either or both Dallas and Fort Worth, Texas, in such manner as to require that Dallas and Fort Worth be

served through a single airport to be designated in the proceedings. A true and correct copy of said Order No. E-18719 is attached hereto, designated as Exhibit A to this Complaint, and adopted herein for all purposes by reference; and a true and correct copy of said Order No. E-19117 is attached hereto, designated as Exhibit B to this Complaint, and adopted herein for all purposes by reference.

VI.

The Civil Aeronautics Board's Order of Investigation made the Cities of Dallas and Fort Worth parties to the proceeding as well as the following air carriers: American Airlines, Inc., Braniff Airways, Inc., Central Airlines, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., and Trans-Texas Airways, Inc. (now Texas International Airlines, Inc.). The Citizens Aviation Association of Dallas, and Compania Mexicana de Aviacion, S.A., were permitted to intervene. The Federal Aviation Administration (then Federal Aviation Agency) did not intervene but presented evidence and participated in the public hearings. Public hearings for the presentation of evidence by all parties were held in Arlington, Texas, Dallas, Texas, and Washington, D.C. Briefs were filed by the City of Dallas, the City of Fort Worth, American Airlines, Inc., Braniff Airways, Inc., The Citizens Aviation Association, and the Civil Aeronautics Board's Bureau of Economic Regulation.

VII.

Based upon the full record of the investigation, the briefs of the parties, and the initial decision of the hearing examiner, the Civil Aeronautics Board adopted Order No. E-21341 on September 30, 1964, declaring the unanimous opinion of the Civil Aeronautics Board that air carrier service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present

and future requirements for transcontinental cargo and passenger services. A true and correct copy of said Order No. E-21341 is attached hereto, designated as Exhibit C to this Complaint, and adopted herein for all purposes by reference. This Order gave Dallas and Fort Worth 180 days within which to arrive at a voluntary agreement concerning the location of the airport to be used for the consolidated service and to submit such agreement to the Civil Aeronautics Board.

VIII.

The inability of the Cities of Dallas and Fort Worth to agree within 180 days on a voluntary agreement as to the airport to be designated by the Civil Aeronautics Board as the single airport to serve the two cities resulted in the adoption by the Civil Aeronautics Board of Order No. E-22028 on April 13, 1965, remanding the proceeding to the Examiner for the purpose of assisting the Cities of Dallas and Fort Worth in reaching a definitive agreement with respect to their airport problems, making any such agreement part of the official record in the proceeding, and entering an appropriate order terminating the investigation. While definitive agreement has been reached between the Cities of Dallas and Fort Worth, as hereinafter more fully appears, no order terminating the investigation has ever been entered and the entire proceeding remains open to this date, and under the continuing jurisdiction of the Civil Aeronautics Board. A true and correct copy of said Order No. E-22028 is attached hereto, designated as Exhibit D to this Complaint, and adopted herein for all purposes by reference.

IX.

Pursuant to the Civil Aeronautics Board's Order No. E-22028 described in Paragraph VIII, the Examiner proceeded to meet with representatives of the Cities of Dallas and Fort Worth. The first definitive agreement resulting

from these meetings was a Memorandum of Understanding dated March 28, 1965. This Memorandum of Understanding was approved by the City Councils of both Dallas and Fort Worth. The essential points of the agreement were:

(1) Both cities will support the joint airport authority constitutional amendment to be submitted to the voters of the State in November, 1966, as well as mutually acceptable joint authority enabling legislation in accordance with such constitutional amendment, and shall endeavor to obtain a favorable vote by the taxpayers of their respective counties to become a part of such joint airport authority.

(2) Both cities will cooperate fully in obtaining as promptly as possible the services of a completely independent airport planning consultant or engineer of national stature whose assignment will be to recommend, after study, to be done as expeditiously as possible, the precise site, size and configuration of a regional airport, such site to be located between Dallas and Fort Worth and limited only by Tarrant and Dallas Counties, North and South. The work on said study shall commence without delay and shall be pursued to completion, if possible within 60 days from the date of employment. The consultant or engineer shall have the benefit of all prior studies made by both cities. The cost of the study shall be borne equally by the two cities.

(3) Both cities recognize the importance of necessary land acquisition as promptly as possible after selection of the site and will cooperate in working out the necessary mechanics for such acquisition.

(4) Dallas and Fort Worth will proceed immediately to establish an interim organization with power to take initial steps to insure the expeditious planning,

financing, and construction of the regional airport, the construction to be completed and operational by 1971 but in no event later than 1973.

(5) Dallas and Fort Worth will submit progress reports to the Board at such intervals as the Board shall require.

The progress reports to the Civil Aeronautics Board mentioned in point (5) are being made at regular intervals to this date, the most recent report having been made on December 28, 1971. A true and correct copy of the Memorandum of Understanding is attached hereto, designated as Exhibit E to this Complaint, and adopted herein for all purposes by reference.

X.

The next definitive agreement reached under the Civil Aeronautics Order No. E-22028 described in Paragraph VIII was a Contract and Agreement dated September 27, 1965, by and between the City of Dallas and the City of Fort Worth establishing the Dallas-Fort Worth Joint Regional Airport Board under the authority of the Municipal Airports Act, Article 46d-1 through Article 46d-22, Revised Civil Statutes of the State of Texas. A true and correct copy of said Contract and Agreement is attached hereto, designated as Exhibit F to this Complaint, and adopted herein for all purposes by reference. This Contract and Agreement was for a term of three years, and Paragraph 7 thereof expressed the intention of the Cities of Dallas and Fort Worth that this initial organization would be terminated and transferred to a Bi-County Regional Airport Authority upon approval of a Texas constitutional amendment authorizing same, enactment of enabling legislation by the Texas Legislature and a favorable vote in an election to be held in Dallas and Tarrant Coun-

ties. While the Amendment to the Constitution of Texas, Article 9, Section 12, was adopted by the voters of Texas in an election held on November 8, 1966, and the enabling legislation was passed, the issue for the creation of the North Central Texas Airport Authority in Dallas and Tarrant Counties was defeated by the voters of Dallas County in an election on June 6, 1967.

XI.

The failure of the Bi-County Airport Authority proposition required the Cities of Dallas and Fort Worth to restructure the interim Dallas-Fort Worth Joint Regional Airport Board into a permanent body and this was accomplished under a new Contract and Agreement dated and effective as of April 15, 1968, continuing, expanding and further defining the powers and duties of the Dallas-Fort Worth Regional Airport Board, creating the Joint Airport Fund of the Cities and providing for the construction and operation of the Dallas-Fort Worth Regional Airport. A true and correct copy of said Contract and Agreement of April 15, 1968, is attached hereto, designated as Exhibit G to this Complaint, and adopted herein for all purposes by reference.

XII.

The Contract and Agreement of April 15, 1968, contains the present agreement between the Cities of Dallas and Fort Worth as to the Dallas-Fort Worth Regional Airport to be designated as the single airport to serve the scheduled air carrier needs of the two cities, including the plans and program for implementing the Agreement, all as ordered by the Civil Aeronautics Board in the concluding paragraph of its Order No. E-21341, described in Paragraph VII and set forth in Exhibit C to this Complaint.

XIII.

Plaintiff, Dallas-Fort Worth Regional Airport Board, is the administrative operating Board of Directors for the Dallas-Fort Worth Regional Airport.

XIV.

Pursuant to the Contract and Agreement of April 15, 1968, (Exhibit G) and on the recommendation of the Dallas-Fort Worth Regional Airport Board, the City Councils of Dallas and Fort Worth adopted the 1968 Regional Airport Concurrent Bond Ordinance authorizing the issuance of Dallas-Fort Worth Regional Airport Joint Revenue Bonds for the financing of the Airport. A true and correct copy of said 1968 Regional Airport Concurrent Bond Ordinance is attached hereto, designated as Exhibit H to this Complaint, and adopted herein for all purposes by reference. Under the 1968 Ordinance and five ordinances supplemental thereto, Plaintiffs have authorized and issued $422,000,000.00 of bonds in six series, all of which are presently outstanding:

1. Series 1968, dated 11-1-68, $35,000,000.00.
2. Series 1970, dated 4-1-70, $50,000,000.00.
3. Series 1970A, dated 11-1-70, $50,000,000.00.
4. Series 1971, dated 3-1-71, $75,000,000.00.
5. Series 1971A, dated 9-1-71, $100,000,000.00.
6. Series 1972, dated 3-1-72, $112,000,000.00.

In further implementation of the Agreement to provide a single airport to serve the scheduled air carrier needs of the two cities as ordered by the Civil Aeronautics Board, Plaintiffs Dallas and Fort Worth have acquired in fee as of February 1, 1972, 16,956 acres of land, more or less, at a cost to that date of $57,930,560.00, out of proceeds from tax-supported bonds and warrants.

XV.

The Dallas-Fort Worth Regional Airport is scheduled to become operational in July, 1973.

XVI.

The $422,000,000.00 of Revenue Bonds mentioned in Paragraph XIV of this Complaint are payable from and secured by an irrevocable first lien and pledge of "Pledged Revenues". "Pledged Revenues," as defined in the six ordinances, are gross revenues derived from the ownership and operation of the Dallas-Fort Worth Regional Airport.

The Cities of Dallas and Fort Worth, pursuant to all of the foregoing orders of the Civil Aeronautics Board, have agreed in the six ordinances:

(1) to provide for the orderly, efficient and effective phase-out at Love Field and Redbird Airports (owned and operated by the City of Dallas) and at Greater Southwest International Airport and Meacham Field (owned and operated by the City of Fort Worth) of any and all scheduled air carrier services, and to transfer such activities to the Dallas-Fort Worth Regional Airport effective upon the beginning of operations at the Dallas-Fort Worth Regional Airport;

(2) that they will through every legal and reasonable means promote the optimum development of the lands and facilities comprising the Dallas-Fort Worth Regional Airport at the earliest practicable date;

(3) that the Dallas-Fort Worth Regional Airport Board shall fix, place into effect and from time to time revise, directly or through leases, contracts and agreements with users of the Airport, schedules of rentals, rates, fees and charges for the use, operation and occupancy of the Dallas-Fort Worth Regional Airport and the services appertaining thereto, which will produce the necessary Pledged Revenues; and

(4) that to the full extent they lawfully may, no free use of the land, public roads and way comprising a part of the Dallas-Fort Worth Regional Airport shall be allowed or permitted.

The prospective rentals, rates, fees and charges for the use, operation and occupancy of the Dallas-Fort Worth Regional Airport by Defendant and the scheduled air carriers competing with Defendant over the same routes greatly exceed the sum of $10,000.00.

XVII.

Pursuant further to Order No. E-21341 (Exhibit C) of the Civil Aeronautics Board as described in Paragraph VII of this Complaint, the Dallas-Fort Worth Regional Airport Board on February 9, 1970, executed agreements with all scheduled air carriers then serving Dallas-Fort Worth wherein such carriers agreed to move their scheduled air carrier services serving the Dallas-Fort Worth Area to the Dallas-Fort Worth Regional Airport when it becomes operational. These carriers are:

American Airlines, Inc.
Braniff Airways, Inc.
Continental Airlines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
Frontier Airlines, Inc.
Ozark Airlines, Inc.
Texas International Airlines, Inc.

Each of the above air carriers operates solely under the authority and jurisdiction of the Civil Aeronautics Board.

Under the agreements with the Dallas-Fort Worth Regional Airport Board, each of the above air carriers has agreed that it will pay annually rentals, fees and charges for its use, operations and occupancy of the Dallas-Fort Worth Regional Airport premises and facilities and the

services appertaining thereto in an amount which, together with rentals, fees and charges paid by other airlines and others using the Dallas-Fort Worth Regional Airport premises and facilities, will be sufficient to produce total gross revenues required to satisfy the Dallas-Fort Worth Regional Airport Board's obligation under the bond ordinances described in Paragraphs XIV and XVI of this Complaint.

XVIII.

Defendant, Southwest Airlines Co., is a Texas corporation, operating under a certificate of public convenience and necessity number 22, issued by the Texas Aeronautics Commission on November 6, 1970. Under said certificate number 22, Southwest Airlines Co. is authorized to operate as an intrastate common carrier by air for the transportation of persons and property, utilizing Federal Aviation Administration Certificated aircraft of any gross take-off weight, between and among the points Dallas Fort Worth, Houston and San Antonio, Texas. Southwest Airlines is authorized to begin or terminate, and begin and terminate, service at any airports serving those points named above.

XIX.

Defendant commenced the operations mentioned in Paragraph XVIII of this Complaint in June or July of 1971, serving the point Dallas/Fort Worth from Love Field, which on said date of commencement of service was the only airport serving said point.

XX.

Defendant performs the operations mentioned in Paragraph XVIII of this Complaint in competition with two interstate carriers, Braniff Airways, Inc., and Texas International Airlines, Inc. These interstate carriers operate solely under the authority and jurisdiction of the Civil Aeronautics Board.

XXI.

Braniff Airways, Inc., and Texas International Airlines, Inc., were original parties to the Civil Aeronautics Board Investigation under Docket No. 13959 as described in Paragraphs V, VI, and VII of this Complaint, as well as parties to the Agreements with the Dallas-Fort Worth Regional Airport Board described in Paragraph XVII of this Complaint.

XXII.

On or about August 2, 1971, Defendant Southwest Airlines Co., through its President, Lamar Muse, was invited to attend regular monthly planning meetings at the offices of the Dallas-Fort Worth Regional Airport Board for the purpose of arranging and planning for the transfer of its scheduled air carrier service to the Dallas-Fort Worth Regional Airport in mid-1973, when it would become the single airport for air carrier service to Dallas and Fort Worth as ordered by the Civil Aeronautics Board. On or about October 20, 1971, Defendant, through its Vice President-Marketing, Richard Elliot, informed the Board through its Consultant for Properties and Facilities, Charles W. Cronin, that Southwest Airlines Co. would attend no further planning meetings and that Southwest Airlines Co. intended to continue its operations to and from Love Field in Dallas, Texas, and William P. Hobby Airport in Houston, Texas, after the opening of the Dallas-Fort Worth Regional Airport.

XXIII.

In connection with the Southwest Airlines Co. operations to and from William P. Hobby Airport in Houston, Texas, on November 12, 1971, the office of the Regional Counsel of the Federal Aviation Administration issued a written opinion to the Department of Aviation of the City of Houston, Texas, stating that existing grant agreements between the City of Houston and the United States of America require the City of Houston to keep its airports open to "all types,

kinds, and classes of aeronautical use without discrimination between such types, kinds, and classes," but that such grant agreements then provide:

> "... the sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public".

The opinion further stated:

> "We advised you recently that should the City allow an intrastate scheduled air carrier to operate into Hobby Airport and at the same time prohibit other scheduled air carriers from using that airport, the city would be in violation of the terms of its grant agreements because it would be unjustly discriminating between classes of aeronautical use."

A true and correct copy of said opinion of the office of the Regional Counsel of the Federal Aviation Administration is attached hereto, designated as Exhibit I to this Complaint, and adopted herein for all purposes by reference.

Identical Federal Grant agreements have been made by the City of Dallas with respect to the Love Field Airport. As Plaintiffs have hereinabove shown, the Civil Aeronautics Board has determined in the case of service to Dallas/Fort Worth that single airport service is required to serve the civil aviation needs of the public, and the single airport is to be the Dallas-Fort Worth Regional Airport upon its opening.

XXIV.

In the period between November, 1971, and March 1972, various officers and attorneys of Defendant, Southwest Airlines Co., have been quoted in Dallas and Fort Worth area newspapers and on Dallas and Fort Worth area television stations as declaring for Southwest Airlines Co. an intention to continue its operations at Love Field after the

opening of the Dallas-Fort Worth Regional Airport and to resist with every available legal remedy any requirement to operate from the Dallas-Fort Worth Regional Airport as the single airport serving Dallas and Fort Worth upon its opening.

This course of action by Defendant's officers and attorneys has generated grave concern on the part of interstate scheduled air carriers competing with Defendant over the same routes as those served by Defendant, and Plaintiff attaches hereto and designates as Exhibit J, a true and correct copy of a letter dated November 23, 1971, from W. Lloyd Lane, then President of Texas International Airlines, Inc., to Erik Jonsson, Chairman of the Dallas-Fort Worth Regional Airport Board, in evidence thereof.

XXV.

On March 6, 1972, Defendant, Southwest Airlines Co., filed with Plaintiff, Dallas-Fort Worth Regional Airport Board, a Petition for Determination of Exemption And, In the Alternative, Application of Waiver from "1968 Regional Airport Concurrent Bond Ordinance." A true and correct copy of said Petition is attached hereto, designated as Exhibit K to this Complaint and adopted herein by reference solely for purposes of showing the actual controversy between the parties, and without admitting any part thereof, but on the contrary Plaintiffs wholly deny the truth of same.

XXVI.

During the time since March 6, 1972, that Plaintiff, Dallas-Fort Worth Regional Airport Board has had the subject matter of said Petition under deliberation, and specifically on May 9, 1972, Thomas M. Sullivan, Executive Director of the Dallas-Fort Worth Regional Airport Board received a letter on the letterhead of Akin, Gump, Strauss, Hauer and Feld, Attorneys at Law, Dallas, Texas, as At-

torneys for Defendant, Southwest Airlines Co., notifying the Dallas-Fort Worth Regional Airport Board of the intention of Southwest Airlines Co. to proceed with the legal remedies available unless a satisfactory response to its Petition described in Paragraph XXV, of this Complaint, was received by Friday, May 19, 1972. A true and correct copy of said letter, dated May 8, 1972, is attached hereto, designated as Exhibit L, and adopted herein by reference solely for purposes of showing the actual controversy between the parties.

XXVII.

The Petition of Southwest Airlines Co. to the Dallas-Fort Worth Regional Airport Board described in Paragraph XXV of this Complaint, and as set forth in Exhibit L asserts:

(a) that the provisions of the 1968 Regional Airport Concurrent Bond Ordinance described in Paragraph XIV of this Complaint and attached hereto as Exhibit H, cannot apply to Southwest Airlines Co. and its operations at Love Field because such application would not be legally permissible under Federal and State law; and

(b) in the alternative, that Southwest Airlines Co. is entitled to a waiver pursuant to Article IX, Section 9.5 of the 1968 Regional Airport Concurrent Bond Ordinance because such a waiver is in the interest of satisfying an overriding public need for decentralized certificated air carrier services in the Dallas-Fort Worth metropolitan region considered as a whole.

XXVIII.

On June 6, 1972, the Dallas-Fort Worth Regional Airport Board passed a resolution determining that it was

without jurisdiction to proceed to hear or act upon the Petition of Southwest Airlines Co. because:

(a) the Civil Aeronautics Board, an agency of the United States, has exercised its controlling jurisdiction to determine that, in order to serve the civil aviation needs of the public, Dallas and Fort Worth, Texas, shall be served by scheduled air carriers at a single airport;

(b) the Cities of Dallas and Fort Worth, acting under the direct orders of the Civil Aeronautics Board so to do, reached agreement, including the plans and program for implementing the agreement, on the location and construction of the Dallas-Fort Worth Regional Airport to be designated by the Civil Aeronautics Board as the single airport to serve the needs of the two cities for scheduled air carrier service; and

(c) neither the 1968 Regional Airport Concurrent Bond Ordinance nor any other enactment, State or local, authorizes the Regional Airport Board to implement any policy designed to further, permit or require scheduled air carrier service to and from Dallas/Fort Worth at other than a single airport while the Civil Aeronautics Board ruling to the contrary is in effect.

A true and correct copy of said Resolution by the Dallas-Fort Worth Regional Airport Board is attached hereto, designated as Exhibit M to this Complaint, and adopted herein for all purposes by reference.

XXIX.

Plaintiffs say that not only does Federal law authorize Plaintiffs to transfer all scheduled air carrier services to the Dallas-Fort Worth Regional Airport upon its opening, on a non-discriminatory basis, but that Plaintiffs cannot

be required under Federal law, or any State law or local enactment:

(a) to allow interstate carriers to continue to operate at Love Field in competition with Defendant, contrary to the determination of the public convenience and necessity by the Civil Aeronautics Board; or

(b) to limit the use of Love Field to intrastate carriers such as Defendant, thereby discriminating against the interstate carriers in competition with Defendant over the same routes, and contrary to the ruling of the Federal Aviation Administration described in Paragraph XXIII of this Complaint.

XXX.

By reason of the rulings of the two agencies of the United States Government under the Federal Aviation Act of 1958 (Public Law No. 85-726, 85th Congress, 2nd Session, 72 Stat. 731; 49 USC 1301 et seq.), as amended, with which rulings Plaintiffs have agreed to comply and stand ready to comply, and the conflicting claims of Defendant which greatly interfere with the planning and procedure necessary to accomplish an orderly transfer of all scheduled air carrier services to the Dallas-Fort Worth Regional Airport upon its opening, Plaintiffs allege:

(1) that a declaratory judgment by this court is urgently required to settle the rights of the parties;

(2) that a speedy hearing of this action for a declaratory judgment is required as authorized under rule 57 of the Federal Rules of Civil Procedure; and

(3) that this court in its discretion should advance this proceeding on the calendar.

XXXI.

Plaintiffs, the City of Dallas, Texas, the City of Fort Worth, Texas, and the Dallas-Fort Worth Regional Airport Board request Defendant, Southwest Airlines Co., before

the expiration of forty-five (45) days after service of the Summons and Complaint upon it to make the following admissions for the purpose of this pending action only and subject to all pertinent objections to admissibility which may be interposed at the trial: That each of the following documents, which are alphabetically lettered exhibits attached to this Complaint, is genuine:

A) Civil Aeronautics Board's Order No. E-18719 ordering an investigation under Docket No. 13959, dated August 20, 1962.

B) Civil Aeronautics Board's Order No. E-19117, being an amendment to Order E-18719, dated December 19, 1962.

C) Civil Aeronautics Board's Order No. E-21341, declaring its unanimous opinion that the Cities of Dallas and Fort Worth should be served through a single Airport, dated September 30, 1964.

D) Civil Aeronautics Board's Order No. E-22028, remanding the proceeding to the Examiner for purpose of assisting the two Cities, dated April 13, 1965.

E) The Memorandum of Understanding between the Cities of Dallas and Fort Worth, dated March 28, 1965.

F) Contract and Agreement between the Cities of Dallas and Fort Worth establishing the Dallas-Fort Worth Joint Regional Airport Board, dated September 27, 1965.

G) Contract and Agreement between the Cities of Dallas and Fort Worth establishing the Dallas-Fort Worth Regional Airport Board, dated April 15, 1968.

H) The 1968 Regional Airport Concurrent Bond Ordinance of the Cities of Dallas and Fort Worth, dated November 12, 1968.

I) Legal Opinion from the Office of Regional Counsel of the Federal Aviation Administration to the Depart-

ment of Aviation of the City of Houston, Texas, dated November 12, 1971.

J) Letter from W. Lloyd Lane, then President of Texas International Airlines, Inc., to Erik Jonsson, Chairman of the Dallas-Fort Worth Regional Airport Board, dated November 23, 1971.

K) Petition of Southwest Airlines Co., to the Dallas-Fort Worth Regional Airport Board, dated March 6, 1972.

L) Letter from Attorneys for Southwest Airlines Co. to Thomas M. Sullivan demanding satisfactory action on the Airlines' Petition, dated May 8, 1972.

M) Resolution of the Dallas-Fort Worth Regional Airport Board declaring its lack of jurisdiction to consider the Petition of Southwest Airlines Co., dated June 6, 1972.

WHEREFORE, Plaintiffs respectfully pray that the court adjudge:

1. That Plaintiffs are not prohibited under the Federal Aviation Act of 1958 (Public Law No. 85-726, 85th Congress, 2nd Session, 72 Stat. 721; 49 USC 1301 et seq.), as amended, or any other applicable Federal law, from transferring all scheduled air carrier service, both intrastate and interstate, to a single airport to be designated as the Dallas-Fort Worth Regional Airport.

2. That due to the exercise of jurisdiction by the Civil Aeronautics Board determining that Dallas and Fort Worth shall be served by interstate carriers at a single airport, Plaintiffs cannot lawfully be prevented under any provision of State law or local enactment from requiring, on a non-discriminatory basis, that all scheduled air carrier service be to and from a single airport.

3. That the Dallas-Fort Worth Regional Airport Board is without jurisdiction to determine overriding public need for decentralized certificated air carrier service

in the Dallas-Fort Worth metropolitan region considered as a whole while a contrary determination of the public convenience and necessity by the Civil Aeronautics Board continues in effect.

4. That Plaintiffs shall have such other and further declaratory relief as they shall show themselves to be justly entitled.

5. That Plaintiffs recover their costs.

DATED: June 6th, 1972.

CITY OF DALLAS, TEXAS

By /s/ N. ALEX BICKLEY
N. Alex Bickley
City Attorney
501 City Hall
Dallas, Texas 75201

CITY OF FORT WORTH, TEXAS

By /s/ S. G. JOHNDROE, JR.
S. G. Johndroe, Jr.
City Attorney
1000 Throckmorton Street
Fort Worth, Texas 76102

DALLAS-FORT WORTH REGIONAL AIRPORT BOARD

By /s/ LEE E. HOLT
Lee E. Holt
Assistant City Attorney,
City of Dallas
Legal Counsel (by assignment) to
the Dallas-Fort Worth Regional
Airport Board
P.O. Drawer DFW
Arlington, Texas 76011

SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
DEC 10 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS,
THE CITY OF FORT WORTH, TEXAS,
AND THE DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD,

Petitioners,

v.

SOUTHWEST AIRLINES CO., and
THE TEXAS AERONAUTICS COMMISSION,

Respondents.

REPLY BRIEF FOR PETITIONERS

N. ALEX BICKLEY,
City Attorney
City of Dallas, Texas
501 City Hall
Dallas, Texas 75201

S.G. JOHNDROE, JR.,
City Attorney
City of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

LEE E. HOLT,
Legal Counsel
Dallas-Fort Worth Regional
Airport Board
P.O. Drawer DFW
Dallas-Fort Worth Airport
Texas 75261

ERWIN N. GRISWOLD
JAMES M. BURGER
Jones, Day, Reavis & Pogue
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF AUTHORITIES

Page

Cases:

Burbank v. Lockheed Air Terminal, 411 U.S. 624 6

Southern Pacific Co. v. Arizona, 325 U.S. 761 13

Statutes:

Air Commerce Act of 1926, ch. 344, 44 Stat. 568 2

Airport and Airway Development Act of 1970, 49 U.S.C. § 1701 *et seq.* (1970) 2

Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 2

Federal Airport Act, ch. 251, 60 Stat. 170 (1946) 2, 5, 6

Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* (1970) 2, 4, 6, 7, 11

Miscellaneous:

14 C.F.R. § 121.391 (1974) 4

49 C.F.R. § 1.47(a) (1973) 3

Frontier Certificate Renewal Case, 14 C.A.B. 519 (1951) 5

FAA Order No. 5190.6, "Airports Compliance Requirements" 4, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS,
THE CITY OF FORT WORTH, TEXAS,
AND THE DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD,

Petitioners,

v.

SOUTHWEST AIRLINES CO., and
THE TEXAS AERONAUTICS COMMISSION,

Respondents.

REPLY BRIEF FOR PETITIONERS

This reply brief is submitted in order to answer certain arguments made in the Brief in Opposition submitted by the two respondents, Southwest Airlines Co. (Southwest), and the Texas Aeronautics Commission (TAC), respectively.

I.

The respondents consistently underplay the role of the Federal Government with respect to airport development. The Southwest brief does, however, cite (Br. 45) 49 U.S.C. § 1508(a) where Congress, in the Federal Aviation Act of 1958, provided that:

> The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . .

The respondents seek to avoid this, saying that Congress has specifically exempted intrastate aviation from regulation other than that pertaining to air safety retained by the Administrator of the FAA pursuant to 49 U.S.C. § 1655(c)(1).

This argument reads too much into the limitation on the power of the federal agencies with respect to intrastate commerce. That limitation relates to economic regulation by the CAB, such as the granting of a certificate of public convenience, and the regulation of fares. But Congress has not limited the powers of its agencies over other aspects of air commerce, and specifically with respect to airports. Congress recognized the essential role of *both* airways and airports in the Air Commerce Act of 1926 (ch. 344, 44 Stat. 568), the Civil Aeronautics Act of 1938 (ch. 601, 52 Stat. 973), the Federal Aviation Act of 1958 (49 U.S.C. §§ 1301(4), 1303, and 1348), the Federal Airport Act of 1946 (49 U.S.C. § 1101 *et seq.*) and the Airport and Airway Development Act of 1970 (49 U.S.C. § 1701 *et seq.*). The suggestion that

intrastate aircraft are subject to FAA jurisdiction only when they navigate the airways, and that the Federal Government has not sought to exercise control over the use of airports is not tenable.

Southwest attempts to limit FAA jurisdiction to the powers over air safety listed in 49 U.S.C. § 1655(c)(1). That restriction ignores the comprehensive scope of the Federal Aviation Program enacted by Congress. In regulating airports, the Administrator of the FAA acts not only in an air safety capacity, but as the delegate of the Secretary of the Department of Transportation.[1] As such the Administrator's authority extends to "air commerce," and he is directed (49 U.S.C. § 1303, emphasis supplied) to exercise his powers over "air commerce in such manner as to best promote its *development* and safety . . ." The Administrator is also directed to promote, encourage, and develop civil aeronautics. Finally, in controlling the navigable air space (including that necessary for landing and takeoff), and in regulating civil aviation operations, the Administrator must do so in the interest of "safety and *efficiency*." The national airport system, as Congress has many times recognized, is the key to the national aviation system. For the FAA to ignore this in its role of fostering the development of air commerce would be contrary to its specific statutory responsibilities.

Intrastate commerce is not exempted from this scheme. Air commerce by definition under the Federal Aviation Act, includes "any operation or navigation of aircraft within the limits of any Federal airway or any

[1] The delegation is made by 49 C.F.R. § 1.47(a) (1973).

operation or navigation of aircraft which *directly affects*, or which may endanger safety in, interstate, overseas, or foreign air commerce." (49 U.S.C. §1301(4), emphasis supplied.) Southwest concedes that its operations are included within air commerce. (Br. 25) It, nevertheless, argues that the FAA's plan to close Love Field to *all* scheduled airline service is an economic regulation and therefore is ineffective.[2] Such regulation has nothing to do with certificates or with fares. It is no more or less economic than the requirement of the FAA that each of Southwest's aircraft must have one flight attendant for each fifty seats (14 C.F.R. §121.391), or the pending proceedings before the FAA relating to the carriage of handicapped persons (39 Fed. Reg. 24667, July 5, 1974). Southwest's operations are subject to all.

The FAA does not make determinations of economic public convenience and necessity with respect to specific airlines. Those decisions are left to the Civil

[2]Southwest contends (Br. 39) that the FAA "has no regulatory authority at all under either the 1946 or 1970 Acts." In support of this contention, it gives brief and incomplete quotations from an Order of the FAA entitled "Airports Compliance Requirements," Order 5190.6, August 24, 1973. It may be observed that this "order" is 142 pages long. It includes a six page section entitled "Enforcement." (Section 3) Paragraph 105 states: "While it is not presumed to be necessary to achieve compliance by seeking injunctions or judgments for specific performance in courts, it should be understood that this remedy could be sought should the circumstances warrant." This "order" is in fact a comprehensive set of rules for the exercise of federal power under the Airport Acts. To argue that this order or the National Airport System Plan are not significant because they are not labeled "regulations" ignores their obvious purposes and effect. The question is whether state authorities may nullify that exercise of federal power over air commerce when Congress has preempted the field, *not* whether the exercise of that power is formally entitled a regulation.

Aeronautics Board (CAB), and, for intrastate carriers in Texas, to the TAC. But the FAA, pursuant to its air commerce powers, does establish, develop, and regulate airports and airways. The CAB and the TAC are then free to permit the conduct of interstate and intrastate air transportation, respectively, between *points* through *available* airports. All that the FAA has done here, after consultation with both state and federal officials, is to make the Dallas-Fort Worth Regional Airport (Regional Airport) available to all scheduled airline operations and limited the other area airports to other types of aircraft operations. The TAC is quite free to authorize Southwest to use the Regional Airport. But neither the CAB nor the TAC are now free to *require* service into Love Field.[3]

II.

The respondents seek to minimize the effect of the Federal Airport Act, saying (Southwest Br. 42) that the Federal Airport Plan made by the Federal Aviation Administrator amount only to "making notations on pieces of paper." Such belittling is not relevant. It could also be said that a decree of this Court consists only of "making notations on pieces of paper."

Of course, the Federal Airport Act (see Appendix F to the Petition), first adopted in 1946, was an important step in the assertion of Federal authority with respect to the nation's airspace. By the Federal

[3]The CAB has long recognized this fact and routinely relieved air carriers from requirements to serve a given point because the airport was unavailable to airline operations. *Frontier Certificate Renewal Case*, 14 C.A.B. 519, 535 (1951).

Airport Act, 49 U.S.C. § 1102. Congress not merely "authorized" the Administrator, but "directed" him to prepare a National Airport Plan. This was intended to be an important exercise. Indeed, by the same Act, Congress provided for the making of grants for airport development, and it expressly provided that these grants were to be made "in conformity with the national airport plan prepared and from time to time revised as provided in this chapter. . . ." 49 U.S.C. § 1103(a). Such a plan was prepared with respect to the Dallas-Fort Worth Regional Airport, and it expressly provided that the Regional Airport was "To ultimately accommodate all airline services." Department of Transportation, Federal Aviation Administration, *1966/67 National Airport Plan FY 1968-72* at 186. Based upon this plan, the Federal Government made large grants for the construction of the Regional Airport.

All of these are substantive actions, showing (with other statutes, such as the Federal Aviation Act) the intention of Congress to move into the field, and to exercise its "complete and exclusive national sovereignty in the airspace," 49 U.S.C. § 1508(a), in a comprehensive manner with respect to airport development. The combination of powers granted by Congress to the FAA shows clearly "the pervasive nature of the scheme of federal regulation", *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 with respect to airport development and usage. If the Federal Airport Plan, developed pursuant to explicit Congressional authorization and direction, is to be effective, there is no room for inconsistent actions of state regulatory authorities such as that undertaken by the TAC here.

It is no answer to say (Br. 40) "that the 1946 Act and the 1970 Act are . . . simply grant statutes setting forth the conditions upon which aid will be rendered to local bodies in the development of their airports." On the contrary, these statutes specifically direct the Administrator to make and keep up to date "a national plan for the development of public airports," and not only provide for grants but expressly provide that no airport development should be supported "other than that included in the current version of the National Airport Plan formulated by the Administrator under this chapter. . . ." 49 U.S.C. § 1108(a). These Acts and the other powers and responsibilities assigned to the Federal Government by Congress, standing alone, show that Congress has occupied the field.

Further recognition of this federal preemption is evidenced by the following excerpt from FAA Order 5190.6, "Airports Compliance Requirements" (cited by Southwest at Br. 36):

> 3. *BACKGROUND OF AIRPORT OBLIGATIONS.* The Federal Aviation Act of 1958 (and the Civil Aeronautics Act of 1938 which preceded it) charges the Administrator with broad responsibilities for the regulation of air commerce in the interests of safety and national defense and for the promotion, encouragement, and development of civil aeronautics. Under these broad powers the FAA seeks to achieve safety and efficiency of the total airspace system through direct regulation of airmen, aircraft, and the airspace. Airports are an essential part of the national airspace system. . . .

The FAA has thus determined that airports are an "essential part of the national airspace system," and must be included in the regulation of that system. Moreover, the FAA has implemented this general policy in numerous instances including the supervision and funding of the development of the Dallas-Fort Worth area airports. Such FAA action, coupled with the Acts of Congress and the FAA's own airspace management policy, leave no doubt as to preemption. Accordingly, there can be no interference with the Federal Airport Plan by a state regulatory body.

III.

The Brief in Opposition of Southwest Airlines states (Br. 27) that the Regional Airport "was constructed to promote the economic well-being of the CAB air carriers." It thus tries to create the impression that the designation of the Regional Airport as the exclusive airport for commercial carriers was achieved only at the initiative of the CAB carriers, and that the CAB was simply the tool of the carriers in making this designation. This, however, is not a fair reflection of the role of the CAB and the FAA in the matter. It entirely overlooks the part which was played by the Administrator of the FAA (the chief officer and spokesman of the Agency) who joined with the Chairman of the CAB in issuing the statement of April 24, 1961, which called for "a single airport serving adjacent communities." See Pet. 25-26. It was the Administrator

of the FAA who made the several airport plans, as directed by Congress, which provided that the Regional Airport should be the exclusive airport for commercial operations. The trunkline air carriers may or may not have found this convenient for their purposes, but the official impetus clearly came from the CAB and, particularly, from the Administrator of the FAA who was responsible for making the airport plans, and for making the grants which made the airport possible.

It is hardly realistic to say that there was no official action here by the Federal Government because the trunk airline carriers were manipulating the CAB and the Administrator of the FAA, in some way, for their own purposes. The fact is that there was substantial and continuous official action, over a long period of time, duly authorized by Congress, pursuant to its "complete and exclusive national sovereignty in the airspace of the United States."

IV.

The Brief in Opposition suggests that there is no question of public interest and concern involved in the case since "the CAB air carriers . . .have undertaken to pay any and all deficits at DFW, including 1.25 times annual debt service on the DFW Revenue Bonds and their guarantee is backed by $150,000,000 in annual net revenues before taxes." Thus, Southwest's argument seems to amount to the proposition that all the resources of the six trunklines must be devoted to the financing of the Regional Airport to the point of the

insolvency of all of these airlines, before any question is presented by the failure of Southwest to comply with the terms of the National Airport Plan. As Southwest says in its Brief in Opposition (Br. 21): "The Finance Director for the Airport Board admitted that all eight CAB underwriting air carriers would have to become bankrupt and go out of business before DFW could lose one penny of revenue as a result of Southwest's remaining at Love." This is a "let the heavens fall" argument which rather emphasizes the legitimate concern of Congress over national airport policy.

Southwest concludes its brief (Br. 53) by saying that: "This case involves no issue beyond the squabbling of the CAB carriers" with respect to "an airport which, for better or worse, they built to suit their own economic requirements." It is, of course, obvious that there is more in this case than "squabbling among the CAB air carriers." There is a steady growth of Federal movement into the area. There is the joint statement of the CAB and the Administrator of the FAA that there should be a "single airport" in the Dallas-Fort Worth area. There is the comprehensive language of the Federal Aviation Act. There is the development of the National Airport Plan by the Administrator of the FAA, as directed by Congress. There are the extensive Federal grants made in reliance upon and pursuant to that Plan. Finally, there is the construction and completion of a great airport developed entirely in reliance on that Plan.

Against this, Southwest presents no equities. It has not been taken by surprise. It came into the field with full knowledge of the existing situation. It knew that

the Airport Plan had been made, that it provided for all scheduled carriers to use the new airport, and it knew that the airport was being built on that basis, with the then existing carriers all agreeing, in accordance with the Plan, that all scheduled flight operations would be concentrated at the new airport. In answer, Southwest says: "Ah, but we are an intrastate airline, and our authorizations come solely from the Texas Aeronautics Commission." It is true that the CAB does not have authority to regulate Southwest Airlines. But this is not enough. Congress has also given great powers in this area to the FAA, and these powers have been exercised by the Administrator of the FAA in such a way as to make the position of Southwest untenable.

Beginning at the bottom of page 42 of its Brief in Opposition, and extending through most of page 43, Southwest Airlines asks a series of questions which, in its view, support its position in this case. However, these questions are easily answered. The FAA does not regulate airlines in the sense that the CAB regulates the economic aspects of interstate air carriers. But the FAA does have extensive power over airports, and these powers are effective with respect to *all* carriers. Its control extends not only to safety, but also to the "development" and "efficiency" of air commerce[4] and the development of a "National Airport Plan." The activities of Southwest are clearly inconsistent with that Plan as it has been developed and promulgated by the Administrator of the FAA pursuant to the directions of Congress.

[4] The words are in 49 U.S.C. §1303.

All that Southwest need do is to comply with the terms of the National Airport Plan. If it complies with those terms, then the TAC has the authority to grant a certificate to it to transport passengers intrastate, and the CAB does not have economic authority with respect to it. But the fact that the TAC can authorize Southwest to operate within Texas does not mean that the TAC has any authority which is inconsistent with the National Airport Plan which has been developed by the Administrator of the FAA pursuant to Congressional direction. The fact that the TAC has authority to grant a certificate to Southwest does not mean that the TAC can determine what airports are available for use by scheduled carriers. That power has been taken over by Congress, and allocated to the Administrator of the FAA. Once this is recognized, all of the questions asked by Southwest on page 42 and 43 of its Brief in Opposition are readily answered.

CONCLUSION

The action of the State of Texas, through the TAC, as interpreted by the Court below, substantially impedes federal control over the uniform development of air commerce. Even if Congress had not spoken, this would be true. As this Court has stated:

> For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this

> Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests. . . .
>
> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, . . .or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769, 770

Here, of course, Congress, and the FAA, pursuant to Congressional authorization, have spoken in developing the national airport system. The question whether this action can be thwarted by the state is an important one in the field of federal-state relations.

The history and development of the Federal power with respect to airports in this country shows a continued growth which has become a Federal preemption. On that basis, the decision below is erroneous, and should be reversed. In any event, the question whether there has been preemption with

respect to airports in this country is a question of substantial public importance, well worthy of review of this Court.

Respectfully submitted.

N. ALEX BICKLEY, City Attorney
City of Dallas, Texas
501 City Hall
Dallas, Texas 75201

S.G. JOHNDROE, Jr., City Attorney
City of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

LEE E. HOLT, Legal Counsel
Dallas-Fort Worth Regional
Airport Board
P.O. Drawer DFW
Dallas-Fort Worth Airport
Texas 75261

ERWIN N. GRISWOLD
JAMES M. BURGER
Jones, Day, Reavis & Pogue
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

December, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

Supreme Court, U.S.
FILED
JAN 3 19
MICHAEL RODAK, JR.

THE CITY OF DALLAS, TEXAS,
THE CITY OF FORT WORTH, TEXAS,
AND THE DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD,

Petitioners,

v.

SOUTHWEST AIRLINES CO., and
THE TEXAS AERONAUTICS COMMISSION,

Respondents.

PETITION FOR REHEARING

N. ALEX BICKLEY,
City Attorney
City of Dallas, Texas
501 City Hall
Dallas, Texas 75201

S.G. JOHNDROE, JR.,
City Attorney
City of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

LEE E. HOLT,
Legal Counsel
Dallas-Fort Worth Regional
Airport Board
P.O. Drawer DFW
Dallas-Fort Worth Airport
Texas 75261

ERWIN N. GRISWOLD
JAMES M. BURGER
Jones, Day, Reavis & Pogue
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

• CLB PUBLISHERS • LAW PRINTING CO •

TABLE OF CONTENTS

Page

INTRODUCTION 1

GROUNDS FOR REHEARING 2

CONCLUSION 11

Cases:

Barrett v. Atlantic Richfield Co., 444 F.2d 38 (5th Cir. 1971) 8, 9

Burford v. Sun Oil Co., 319 U.S. 315 8

Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 ....4, 5, 6, 10

Davis v. Mann, 377 U.S. 678 10

Flynn v. United States, 75 S. Ct. 285 2

Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 ..... 8, 10

Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 ..... 4, 6, 7

Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 8

Mottolese v. Kaufman, 176 F.2d 30 (2d Cir. 1949) 10

P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951) 10

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 ..... 2, 3

Romero v. Coldwell, 455 F.2d 1163 (5th Cir. 1972) 8, 9

United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 8

United Services Life Ins. Co. v. Delaney, 396 S.W. 2d 855 (Tex. _____) 8, 9

Miscellaneous:

Wright, *Handbook of the Law of Federal Courts*, 199-200, Sec. 52 (2d ed. 1970). 4, 8, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS,
THE CITY OF FORT WORTH, TEXAS,
AND THE DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD,

Petitioners,

v.

SOUTHWEST AIRLINES CO., and
THE TEXAS AERONAUTICS COMMISSION,

Respondents.

PETITION FOR REHEARING

INTRODUCTION

On December 16, 1974, this Court issued an Order denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above case. Pursuant to this Court's Rule 58(2), Petitioners hereby petition the Court for a rehearing on the grounds that under the unequivocal decisions of this

Court the Court of Appeals should have abstained from deciding unsettled questions of state law having to do with the internal affairs of a state and particularly those dealing with the relationship of a state to one of its cities. The *mandatory* doctrine of abstention applicable to city-state relationships has not been previously presented to this Court, but seems clearly applicable inasmuch as the decision of the Court of Appeals below is based *solely* upon (1) previously uninterpreted statutes of the State of Texas dealing with its internal regulatory schemes for air carriers and airports and (2) the relationship under these statutes of the state to the cities of Dallas and Ft. Worth.

Such substantial grounds should be given full consideration by the Court upon a petition for rehearing. "The right to such a consideration is not to be deemed an empty formality as though such petition will as a matter of course be denied." *Flynn v. United States*, 75 S. Ct. 285, 286 (Opinion of Frankfurter, J., in chambers).

Petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on December 16, 1974, and (2) granting the petition.

GROUNDS FOR REHEARING

In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, this Court clearly established the principle that federal courts cannot authoritatively determine the unsettled law of a state, and held that the last word upon the meaning of a state statute belongs to the

courts of the state. Referring to the decision of a three-judge district court with respect to a Texas statute, the Court said (312 U.S. at 499-500):

> "Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. *But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor the the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. Glenn v. Field Packing Co.* 290 U.S. 177; *Lee v. Bickell,* 292 U.S. 415. *The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court.* The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." (emphasis added)

Since the *Pullman* case the abstention doctrine has been amplified and applied in many cases by this Court and the lower federal courts. The doctrine does not apply to every state law issue raised in a federal court, but this Court has fashioned a number of guidelines for determining when the doctrine should be applied and the instant case falls within virtually every guideline adopted by the Court.

A class of cases to which the doctrine uniformly has been applied are cases involving the administration of a

state's internal affairs, including its regulatory schemes. In these cases this Court specifically has focused upon the undesirability of the federal courts intruding into matters of a state's administration of its own procedures. Professor Wright refers to this as a second abstention doctrine:

> "A second abstention doctrine is that a federal court should refrain from exercising its jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs. Thus it is not to issue declaratory judgments as to state taxes, nor interfere with a large-scale highway program simply to protect a landowner's right to compensation, nor take jurisdiction in a receivership proceeding where the state has a comprehensive procedure for liquidation of corporations of the sort involved." Wright, *Handbook of the Law of Federal Courts*, 199-200, Section 52 (2d ed. 1970)

In particular, the Court has pointed out that federal courts should not decide questions of relationships between a state and its cities. And in such cases this Court has not only sanctioned discretionary abstention; it has affirmatively required it, *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, thus establishing a *mandatory* doctrine of abstention in such cases.

One of the cases in this category is directly in point here. In *Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168, questions were raised as to the proper interpretation of a city ordinance and as to whether the city ordinance conflicted with a state statute. Virtually the identical questions are presented in this case with respect to the proper interpretation of a certificate and order issued by the Texas Aeronautics Commission

(TAC) and the supposed conflict between the certificate and order and the provision of the 1968 Regional Airport Concurrent Bond Ordinance of the Cities of Dallas and Fort Worth closing Love Field to scheduled flights. The Court of Appeals based its decision *solely* on the supposed conflict between the actions of the TAC and the cities. As the TAC said on page 12 of its brief before this Court, "It is to the distribution of authority between municipality and state that the opinion of the Court [Fifth Circuit] was addressed . . . ."

In *Fieldcrest* this Court said:

> "We are of the opinion that the procedure which we followed in the *Pullman* case should be followed here. *Illinois has the final say as to the meaning of the ordinance in question. It also has the final word on the alleged conflict between the ordinance and the state Act.* The determination which the District Court, the Circuit Court of Appeals, or we, might make could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois.
>
> * * *
>
> "Furthermore, the dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State.
>
> * * *
>
> "The delicacy of that issue and an appropriate regard 'for the rightful independence of state governments' (*Beal v. Missouri Pacific R. Co.*, 312 U.S. 45, 50) re-emphasize that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals.
>
> * * *

"... discretion calls for a remission of the parties to the state courts which alone can give a definitive answer to the major questions posed." 316 U.S. at 171-172 (emphasis added).

In the *Thibodaux* case, 360 U.S. 25, *supra*, the Court reaffirmed the principles of the *Fieldcrest* case and made clear that it had *required* abstention, not merely sanctioned it, in appropriate cases. There the Court said:

"*But where the issue touched upon the relationship of City to State, Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168, *or involved the scope of a previously uninterpreted state statute which, if applicable, was of questionable constitutionality, Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229, *we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination.*

* * *

"In providing on his own motion for a stay in this case, *an experienced district judge was responding in a sensible way to a quandary* about the power of the City of Thibodaux *into which he was placed by an opinion of the Attorney General of Louisiana in which it was concluded that in a strikingly similar case a Louisiana city did not have the power here claimed by the City. A Louisiana statute apparently seems to grant such a power. But that statute has never been interpreted*, in respect to a situation like that before the judge, *by the Louisiana courts* and it would not be the first time that the authoritative tribunal has found in a statute less than meets the outsider's eye. Informed local courts may find meaning not discernible to the outsider. The consequence of allowing this to come to pass would be that this case would be the only case in which the Louisiana statute is construed as we would construe it.

> whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana quite different from ours." 360 U.S. at 27-30 (emphasis added).

The parallels with the instant case are striking. In the *Thibodaux* case the district court was faced with an uninterpreted state statute and an opinion of the state attorney general which appeared to be contrary to the language of the statute. Here the Court of Appeals was faced with a state statute (the Texas Aeronautics Commission Act) which has not been interpreted by the state courts and although its clear language gives the TAC no authority over municipally owned airports, such a power was said to be *implied* as a part of the TAC's power over the routes of intrastate air carriers. And the Texas Attorney General's office generally has supported this proposition, even though the Texas Municipal Airports Act specifically gives municipalities the right to determine the use of airports owned by them. Art 46d-7(a) Vernon's Annotated Texas Statutes.

The matter is far from clear, however, inasmuch as Southwest Airlines itself has urged, and the District Court found, in effect, that the federal Civil Aeronautics Board (CAB) has no such *implied* power over airports by virtue of its power over the routes of federally certificated air carriers and that "the TAC . . . is the CAB of Texas." (See page 9 of the Court's opinion in Civil Action No. CA3-5927-C and page 36 of Southwest's brief to the Court of Appeals for the Fifth Circuit.) If the CAB has no *implied* authority over airports by virtue of its power to regulate interstate carriers, the TAC has no such power over airports as a result of its power over intrastate carriers.

The interpretation of state law accepted by the Fifth Circuit Court of Appeals is therefore frought with inconsistencies and in any event "is nothing more than a forecast" of the law of Texas. Faced with these inconsistencies in the interpretation of state law *not previously interpreted by the state courts of Texas*, the District Court and the Fifth Circuit should have abstained from deciding these important questions dealing with the internal affairs of the State of Texas. *Burford v. Sun Oil Co.*, 319 U.S. 315; *Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639; *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134; *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593.

As Professor Wright points out, "In Burford-type abstention, where the federal court defers to avoid interference with state activities, dismissal of the action, rather than retention of jurisdiction pending a state determination, is appropriate." Wright, *Handbook of the Law of Federal Courts* 200, Section 52 (2d ed. 1970). This procedure is particularly appropriate and necessary in Texas cases in view of the decisions of the Supreme Court of Texas in *United Services Life Insurance Company v. Delaney*, 396 S.W.2d 855, (Tex. 1965), and the Fifth Circuit Court of Appeals in *Barrett v. Atlantic Richfield Co.*, 444 F.2d 38 (5th Cir. 1971) and *Romero v. Coldwell*, 455 F.2d 1163 (5th Cir. 1972).

In the *Delaney* case a split Supreme Court of Texas concluded that the courts of Texas could not render decisions or opinions on questions of state law, pursuant to an abstention order of the federal courts, when the federal court retains jurisdiction to finally decide the case. The court concluded that under such circumstances the Texas courts were being called upon

to render an advisory opinion and that the Texas courts have no power to render such opinions under the state constitution. 396 S.W. 2d at 863.

In the *Barrett* case the Fifth Circuit dealt extensively with the problem created by the *Delaney* case with respect to abstention in Texas cases and concluded that in Texas cases the proper procedure is for the district court to dismiss the case, without prejudice, so that a final and binding judgment can be rendered in the state court. 444 F.2d at 46. The Fifth Circuit reaffirmed this Texas procedure in the recent case of *Romero v. Coldwell, supra*, 455 F.2d at 1167.

In view of the above, there can be no doubt that this case falls clearly within the class of cases to which this Court's mandatory doctrine of abstention applies and that under this doctrine, as applied by the Fifth Circuit in Texas cases, the case should be dismissed without prejudice. Accordingly, this Court should rehear the case, grant certiorari and order dismissal of the case without prejudice so that the state law issues may be decided authoritatively by the courts of Texas.

There is no doubt that these issues will be decided authoritatively by the state courts in one or more cases now pending inasmuch as there are two cases pending in which the same issues are raised. In the case of *Texas International Airlines, Inc. v. The Dallas-Ft. Worth Regional Airport Board, et al*, Case No. 227349 in the District Court of Travis County, Texas, 200th Judicial District, filed December 12, 1974, the exact issues decided by the Fifth Circuit are in issue. In that case the cities of Dallas and Ft. Worth, as well as Southwest Airlines Co. and other airlines serving Dallas-Ft. Worth, are named as defendants, along with the TAC. The case

promises to result in an authoritative decision by the state courts of Texas and includes all of the parties with an interest in the matter. Moreover, there is another case, *Southwest Airlines Co. v. The City of Dallas*, Case No. 74-3178-J in the District Court for Dallas County, Texas, 191st Judicial District, in which Southwest Airlines itself has raised the same issues which were decided by the Fifth Circuit. Certified copies of the complaints in these cases will be provided upon request of this Court.

The pendency of the state court actions between the same parties, raising the same issues, is another compelling reason for this Court to invoke the abstention doctrine. See *Chicago v. Fielderest Dairies, Inc., supra*, 316 U.S. at 173, where this Court said:

> "The desirability of the course which we have suggested is not embarrassed by any question as to whether ready recourse may be had to the state courts. The availability of the state tribunal is obvious, since a case involving substantially identical issues and brought by respondent's parent corporation is pending in state court."

See also Davis v. Mann, 377 U.S. 678; *Kaiser Steel Corp. v. W.S. Ranch Co., supra*, 391 U.S. at 594; *Mottolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949); *P. Beiersdorf & Co. v. McGohey*, 187 F.2d 14 (2d Cir. 1951).

Finally, as Wright says at page 200 of his work on the federal courts, "If the state court to which deference is thus shown prejudices any federal rights of the parties, this can be redressed by review of the state decision in the United States Supreme Court." Thus dismissal of the case will leave the state courts free to

determine the entire controversy, with the right to review decisions of any related federal questions being vested in this court.

CONCLUSION

Petitioners submit that the decisions of this Court with respect to abstention in cases such as the instant case call for a rehearing of this case, for the grant of a writ of certiorari and for an order remanding the case to the Fifth Circuit Court of Appeals with direction that the case be dismissed without prejudice. Otherwise, needless friction will be created between the state and federal courts and the decision of the Fifth Circuit may be embarrassed by a conflicting and controlling decision of the state courts of Texas.

For these reasons, as well as those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and

opinion below, or remand the case to the Court of Appeals for the Fifth Circuit with direction that the case be dismissed without prejudice.

Respectfully submitted,

N. ALEX BICKLEY,
City Attorney
City of Dallas, Texas
501 City Hall
Dallas, Texas 75201

S.G. JOHNDROE, JR.,
City Attorney
City of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

LEE E. HOLT,
Legal Counsel
Dallas-Fort Worth Regional
Airport Board
P.O. Drawer DFW
Dallas-Fort Worth Airport
Texas 75261

ERWIN N. GRISWOLD
JAMES M. BURGER
Jones, Day, Reavis & Pogue
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

CERTIFICATE OF COUNSEL PURSUANT TO RULE 58

The undersigned counsel for the petitioners in the above case hereby certifies, pursuant to Rule 58 of this Court's Rules, that the Petition for Rehearing of Denial of a Writ of Certiorari filed concurrently herewith is presented in good faith and not for the purpose of delay. The undersigned counsel further certifies that the said petition is restricted to substantial grounds available to the petitioners although not previously presented.

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

By _____